No. 06-1717
Title: Richlin Security Service Company, Petitioner
v.
Michael Chertoff, Secretary of Homeland Security
Docketed: June 28, 2007
Lower Ct: United States Court of Appeals for the Federal Circuit
Case Nos.: (2006-1055)
Decision Date: December 26, 2006
Rehearing Denied: April 3, 2007
Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Jun 25 2007	Petition for a writ of certiorari filed. (Response due July 30, 2007)
Jul 26 2007	Order extending time to file response to petition to and including August 29, 2007.
Aug 28 2007	Order further extending time to file response to petition to and including September 28, 2007.
Sep 27 2007	Order further extending time to file response to petition to and including October 12, 2007.
Oct 12 2007	Brief of respondent Michael Chertoff, Secretary of Homeland Security in opposition filed.
Oct 12 2007	Brief amici curiae of National Association of Legal Assistants and Paralyzed Veterans of America filed.
Oct 22 2007	Reply of petitioner Richlin Security Service Company filed.
Oct 24 2007	DISTRIBUTED for Conference of November 9, 2007.
Nov 13 2007	Petition GRANTED.
Nov 28 2007	The time within which to file petitioner's brief on the merits is extended to and including January 4, 2008.
Nov 28 2007	The time within which to file respondent's brief on the merits is extended to and including February 11, 2008.
Dec 6 2007	Motion to dispense with printing the joint appendix filed by petitioner Richlin Security Service Company.
Jan 3 2008	Brief of petitioner Richlin Security Service Company filed.
Jan 7 2008	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.
Jan 11 2008	Brief amici curiae of National Association of Legal Assistants and Paralyzed Veterans of America filed.
Jan 22 2008	SET FOR ARGUMENT Wednesday, March 19, 2008
Feb 5 2008	CIRCULATED.
Feb 5 2008	Record received from the U.S.C.A. for the Federal Circuit. (1 box)
Feb 11 2008	Brief of respondent Michael Chertoff, Secretary of Homeland Security filed. (Distributed)
Feb 13 2008	Record received from the U.S. Civillian Board of Contract Appeals (1 box)
Mar 5 2008	Reply of petitioner Richlin Security Service Company filed. (Distributed)
Mar 19 2008	Argued. For petitioner: Brian Wolfman, Washington, D.C. For respondent: Anthony Yang, Assistant to the Solicitor General, Department of Justice, Washington, D.C.

Supreme Court, U.S.
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No. ____

IN THE
Supreme Court of the United States

RICHLIN SECURITY SERVICE COMPANY,
Petitioner,

v.

MICHAEL CHERTOFF,
SECRETARY OF HOMELAND SECURITY,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504(a)(1) and 28 U.S.C. § 2412(d)(1)(A), may a prevailing party be awarded attorney fees for paralegal services at the market rate for such services, as four circuits have held, or does EAJA limit reimbursement for paralegal services to cost only, as the Federal Circuit panel majority below held?

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INTRODUCTION

Petitioner Richlin Security Service Company respectfully petitions this Court for a writ of certiorari to review a decision of the United States Court of Appeals for the Federal Circuit. The petition presents the question whether the services provided by paralegals working under the direction of an attorney are compensable as "attorney fees" at market rates under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 and 28 U.S.C. § 2412(d), as four circuits have held, or whether such services are recoverable only at cost, as the Federal Circuit held below.

This Court has held that paralegal services are compensable at market rates under the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988, if such services are generally billed separately to clients in the relevant legal market. *See Missouri v. Jenkins*, 491 U.S. 274, 285-89 (1989). The Court has also held repeatedly that similar provisions in federal fee-shifting statutes should generally be interpreted the same. *See, e.g., City of Burlington v. Dague*, 505 U.S. 557, 562 (1992); *Independent Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754, 758 n.2 (1989). In light of the division among the courts of appeals, and the Federal Circuit's failure to follow *Jenkins*, the petition should be granted.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit is reported at 472 F.3d 1370 (2006), and is reproduced in the appendix at 1a. The opinion of the Department of Transportation Board of Contract Appeals is reported at 2005 WL 1635099 (2005), and is reproduced at Pet. App. 25a. The Federal Circuit's supplemental opinion issued in response to petitioner's petition for rehearing is reported at 482 F.3d 1358 (2007), and is reproduced at Pet. App. 54a. The Federal Circuit's unreported order denying rehearing and rehearing en banc is reproduced at Pet. App. 57a.

JURISDICTION

The judgment of the United States Court of Appeals for the Federal Circuit was entered on December 26, 2006. Pet. App. 1a. Petitioner filed a timely petition for rehearing en banc on January 8, 2007, which the Federal Circuit treated as a petition for panel rehearing and rehearing en banc and denied on April 3, 2007. Pet. App. 57a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The Equal Access to Justice Act (EAJA) authorizes an award of fees and other expenses to certain parties who prevail in adversary administrative proceedings or in court against the United States.

5 U.S.C. § 504, the portion of EAJA that applies to adversary administrative proceedings, provides in relevant part:

> (a)(1) An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.
>
> * * *
>
> (b)(1) For the purposes of this section –
>
> (A) "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the agency to be necessary for the preparation of

the party's case, and reasonable attorney or agent fees. (The amount of fees awarded under this section shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the agency involved, and (ii) attorney or agent fees shall not be awarded in excess of $125 per hour unless the agency determines by regulation that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents for the proceedings involved, justifies a higher fee.)[1]

STATEMENT OF THE CASE

A. The Equal Access To Justice Act

In general, EAJA provides that "fees and other expenses" shall be awarded to eligible parties who have prevailed in adversary administrative adjudications and in litigation against the federal government, unless the agency adjudicator or court finds that the position of the United States "was substantially justified or that special circumstances make an award unjust." 5 U.S.C. § 504(a)(1); 28 U.S.C. § 2412(d)(1)(A). "Fees and other expenses" are defined to include "reasonable attorney or agent fees." 28 U.S.C. § 504(b)(1)(A); *see also* 28 U.S.C. § 2412(d)(2)(A) (defining "fees and other expenses" to include "reasonable attorney fees"). The amount of fees awarded "shall

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[1]The nearly identical portions of EAJA applicable to recovery of fees and other expenses incurred in court proceedings are codified at 28 U.S.C. §§ 2412(d)(1)(A), (d)(2)(A). Petitioner Richlin's fee application at issue here sought recovery for fees incurred in a proceeding before the Department of Transportation's Board of Contract Appeals and, thus, was filed under 5 U.S.C. § 504. In general, citations in this petition to provisions of section 504 are accompanied by citations to the corresponding provisions of section 2412(d).

be based on prevailing market rates," subject to a dollar per-hour cap, adjusted for increases in the cost of living. 5 U.S.C. § 504(b)(1)(A)(ii); 28 U.S.C. § 2412(d)(2)(A). A business is eligible for fees if its net worth does not exceed $7 million and it had 500 or fewer employees at the time that the action was filed. 5 U.S.C. § 504(b)(1)(B); 28 U.S.C. § 2412(d)(2)(B).

B. Administrative Proceedings

The merits of this litigation can be summarized briefly. Mistakes in contracts between petitioner Richlin Security Service Company and what was then the Immigration and Naturalization Service (and is now part of the Department of Homeland Security) resulted in the substantial underpayment of Richlin's employees. *See Richlin Sec. Serv. Co. v. Chertoff*, 437 F.3d 1296, 1297 (Fed. Cir. 2006). The underpayments were of such magnitude to a small business like Richlin that, before it won this litigation, Richlin had been unable to pay its employees what they were owed. *Id.* at 1298 (citing *Richlin Sec. Serv. Co. v. Rooney*, 18 F. App'x 843, 844-45 (Fed. Cir. 2001)). Following lengthy proceedings before both the Department of Transportation Board of Contract Appeals (the Board) and the Court of Appeals for the Federal Circuit, the Board awarded Richlin the amount of the additional wages, payroll taxes, and workers compensation premiums that Richlin was required to pay. Pet. App. 3a.

After prevailing on the merits, Richlin sought an award of attorney fees and other expenses under EAJA for the time spent over nearly nine years by its lawyers and paralegals before the Board. The Board found that Richlin met EAJA's size and net-worth limitations, 5 U.S.C. § 504(b)(1)(B), that it was a prevailing party, *see id.* § 504(a)(1), and that the government's position on the merits was not "substantially justified." *See id.* The Board awarded Richlin approximately $50,000 for work done by Richlin's lawyers. *See* Pet. App. 5a.

The Board did not, however, award Richlin fees at the $50 to $95 per hour market rates for paralegal services charged to Richlin over the course of the proceedings. It noted that EAJA does not "expressly provide for the reimbursement of paralegal services at the market rate," *id.* at 6a, and thus held that paralegal services are reimbursable only at the attorney's cost, even where, as is the case here, paralegal time is billed to the client at hourly market rates in the relevant legal market and not at the attorney's cost as an out-of-pocket expense. The Board took judicial notice of paralegal salaries in the Washington, D.C. area "as reflected on the internet" and awarded Richlin $35 per hour as the "reasonable cost to the [law] firm." *Id.* (quoting Board decision). The Board awarded approximately $10,600, representing approximately 300 hours of compensable paralegal time. *See id.*

C. Federal Circuit Proceedings

A divided panel of the Federal Circuit affirmed. The panel majority acknowledged this Court's ruling in *Missouri v. Jenkins*, 491 U.S. 274, 284-89 (1989), that, under the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988, paralegal services are a component of "attorney's fees" compensable at market rates, as long as those services are separately billed in the relevant market. The majority further acknowledged the Court's repeated admonition that "fee-shifting statutes' similar language is a 'strong indication' that they are to be interpreted alike." Pet. App. 13a (quoting *Zipes*, 491 U.S. at 758 n.2). The majority nevertheless distinguished EAJA from section 1988, largely on the ground that the former contemplates an award of "expenses," which could be said to include the cost to law firms of paralegals, while the latter does not. Pet. App. 15a, 19a. The court of appeals also relied on EAJA's per-hour rate cap for attorney fees as justification for limiting recovery for paralegal services,

noting that "it seem[ed] unlikely" that Congress would have capped paralegal and attorney services at the same level. Pet. App. 16a.

In so holding, the Federal Circuit majority expressly rejected the Eleventh Circuit's contrary decision in *Jean v. Nelson*, 863 F.2d 759, 778 (11th Cir. 1988), *aff'd on other issue, Comm'r, INS v. Jean*, 496 U.S. 154 (1990), which held that paralegal time is compensable at market rates under EAJA. *See* Pet. App. 12a-13a; *see also id.* at 55a.

Senior Circuit Judge Plager dissented on the ground that "the panel's position is at variance with established Supreme Court law," Pet. App. 20a-21a, relying on this Court's statement in *Jenkins* that a "'reasonable attorney's fee' cannot have been meant to compensate only work performed personally by members of the bar," but also the work of "others whose labor contributes to the work product for which an attorney bills her client." *Id.* at 21a (quoting *Jenkins*, 491 U.S. at 285); *see also id.* (pointing out that panel majority's rationale "echoes the view of the lone dissenter on this issue in *Jenkins*.").

Richlin petitioned for rehearing en banc. Invoking Federal Rule of Appellate Procedure 35(b)(1)(B), the petition explained that, in addition to the acknowledged conflict with the Eleventh Circuit, the Federal Circuit's ruling had also opened up a conflict with decisions of the Fourth, Eighth, and D.C. Circuits. The petition also noted that a Senate Judiciary Committee report that the panel majority had relied on did not, in fact, support its ruling, and that, in any event, the report was not genuine legislative history because it had accompanied a 1984 version of EAJA that was vetoed by President Reagan, not the 1985 version that was actually enacted.

The panel responded to the petition for rehearing in a supplemental opinion. Pet. App. 54a. The panel majority again acknowledged the direct conflict with the Eleventh Circuit's

decision in *Jean v. Nelson*. *See id.* at 55a. But it played down the significance of the rulings from the three other circuits, saying that although two of them expressly relied on *Jean* and all three referred to recovery for paralegal services "as fees," *id.*, they appeared to be deciding whether paralegal services are compensable at all, not whether they are fees compensable at market rates under EAJA. *Id.* As for the purported legislative history, the supplemental opinion acknowledged that the committee report relied on by the panel majority accompanied vetoed legislation, but held that because the President's veto related to issues other than the compensability of paralegal services, the "earlier legislative history" drafted by a different Congress in 1984 was "pertinent to the 1985 enactment on the issue presented here." *Id.* at 56a n.2. Senior Judge Plager dissented from the supplemental opinion "on the basis of his dissent from the original panel opinion." *Id.*

In an order accompanying its supplemental opinion, the Federal Circuit denied rehearing and rehearing en banc. Pet. App. 57a.

REASONS FOR GRANTING THE WRIT

A. The Federal Circuit's Decision Creates A Division Among The Federal Courts Of Appeals On An Important Issue Of Federal Law.

1. The panel majority below acknowledged that its decision directly conflicts with the Eleventh Circuit's decision in *Jean v. Nelson*, which held that EAJA authorizes recovery of market-rate attorney fees for paralegal services. 863 F.2d at 778. In so holding, the Eleventh Circuit expressly rejected the very argument adopted by the Federal Circuit below – the government's contention "that paralegal time is recompensable only at the actual cost to the plaintiffs' counsel." *Id.* Presaging this Court's efficiency rationale in *Missouri v. Jenkins*, the Eleventh Circuit explained that "[t]o hold otherwise would be

counterproductive because excluding reimbursement for such work might encourage attorneys to handle entire cases themselves, thereby achieving the same results at a higher overall cost." *Id.*; *see Jenkins*, 491 U.S. at 288 (compensating paralegal services is "not only permitted by § 1988, but also makes economic sense.").

As noted above, three other circuits – the Fourth, Eighth, and D.C. – have come to the same conclusion as the Eleventh: that paralegal services are compensable at market rates under EAJA. *See Role Models America, Inc. v. Brownlee*, 353 F.3d 962, 974 (D.C. Cir. 2004); *Hyatt v. Barnhart*, 315 F.3d 239, 255 (4th Cir. 2002); *Miller v. Alamo*, 983 F.2d 856, 862 (8th Cir. 1993).[2]

The Federal Circuit's acknowledgment that the Fourth and Eighth Circuit decisions relied on *Jean* and that all three decisions referred to compensable paralegal services as "fees" is sufficient to demonstrate the deeper conflict among the circuits. After all, reliance on *Jean* necessarily embraces the notion that compensation should be based on market rates, since the efficiency created by market-rate recovery of paralegal services was *Jean*'s fundamental rationale. *See Jean*, 863 F.2d at 778. And, by referring to compensation for paralegal

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[2]*Miller* was decided under the Internal Revenue Code's counterpart to EAJA, 26 U.S.C. § 7430, which is analogous to EAJA in all relevant respects. Thus, *Miller* relied on EAJA precedents, *see* 983 F.2d at 861-62, and the Eighth Circuit has subsequently awarded fees for paralegal services under EAJA, as the Federal Circuit acknowledged in its supplemental opinion below. *See* Pet. App. 55a (citing *Stockton v. Shalala*, 36 F.3d 49, 50 (8th Cir. 1994)).

The Seventh Circuit has also stated unambiguously that "[f]ees for work done by paralegals can be awarded under the fee shifting provision of the EAJA," but that statement was dictum because fees were denied in their entirety on other grounds. *See Krecioch v. United States*, 316 F.3d 684, 687 (7th Cir. 2003).

services as "fees," the other three circuits were presumably relying on the part of EAJA that ties the proper method of calculating "fees" to "market rates," *see* 5 U.S.C. § 504(b)(1)(A) ("The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished . . ."), which is directly at odds with the Federal Circuit's basic holding that paralegal services are cost-based "expenses," *not* "fees."

The Federal Circuit majority nevertheless maintained that the decisions of the Fourth, Eighth, and D.C. Circuits stand only for the proposition that paralegal services are compensable on some basis, leaving the possibility that, in those circuits, such services may be compensable at cost only. If it were correct that some or all of these circuits concurred with the Federal Circuit, or had found paralegal services compensable but had not been clear on whether they were "fees," that would mean only that the circuit split was differently configured or more confused, neither of which would be a reason not to resolve it.

But the Federal Circuit was not correct. Analysis of the three circuit court decisions leaves no doubt that they conflict directly with the decision below. In *Miller*, the Eighth Circuit explicitly relied on *Jean*'s market-based rationale and explained that "[w]ork done by paralegals is compensable if it is work that would have been done by an attorney. If such hours were not compensable, then attorneys may be compelled to perform the duties that could otherwise be fulfilled by paralegals, thereby increasing the overall cost of legal services." 983 F.2d at 862 (citing *Jean*, 863 F.2d at 778). The court allowed the award "at a *rate* of $40 per hour," *id.* (emphasis added), which is language referring to market-based fees, not to the overhead cost for a paralegal. Likewise, in *Hyatt*, the Fourth Circuit held that "paralegal time" is compensable as "fees" under EAJA, also relying on *Jean*. *See* 315 F.3d at 255. In addition, both *Miller*

and *Hyatt* considered the fee applicant's claim for cost-based out-of-pocket reimbursement in parts of their opinions distinct from their discussions of paralegal services, thus underscoring that such services were considered a part of market-rate "fees," and not merely reimbursable at cost. *See Hyatt*, 315 F.3d at 256; *Miller*, 983 F.2d at 862.[3]

Finally, in *Role Models*, the D.C. Circuit rejected the government's claim that paralegal services are not compensable and expressly stated that "[t]his Circuit 'holds that paralegals and law clerks are to be compensated at their *market rates*.'" 353 F.3d at 974 (quoting *In re Donovan*, 877 F.2d 982, 993 n.20 (D.C. Cir. 1989)) (emphasis added). Indeed, the court analyzed at some length the "hourly rates" requested "for the non-lawyers, including the legal assistants and the law clerk" and cut those rates by 25% because the fee applicant had failed to provide evidence of "prevailing market rates," *id.* at 969-70, which would have made no sense if the court were treating paralegal services as awardable only at cost. And, as in *Miller* and *Hyatt*, the court analyzed the fee applicant's entitlement to out-of-pocket reimbursement in a portion of the opinion entirely separate from its discussion of paralegal fees. *See id.* at 974-75.

Beyond opening up a 4-to-1 split among the courts of appeals, the Federal Circuit's decision is at odds with dozens of lower court decisions that reflect a general practice throughout

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[3]Moreover, the rate awarded in *Miller* – $40 per hour – and the time and place of the award underscore that *Miller* endorsed market-rate awards for paralegal services. *Miller* involved a dispute in Arkansas before 1991 (when the Eighth Circuit appeal was filed). The $35 per hour "cost" award affirmed by the Federal Circuit here was based on paralegal salaries in 2006 in Washington, D.C. It is not possible that the overhead cost of paralegal services in Arkansas before 1991 was greater than the overhead cost of such services in Washington, D.C. in 2006. Therefore, *Miller* must have involved a market-rate award.

the country: Market-rate EAJA fees are awarded for paralegal services when doing so mirrors billing practices in the relevant legal market.[4]

2. Taken together, the decisions of other federal courts render the Federal Circuit's ruling a distant outlier. Although the presence of one outlier is sometimes properly ignored in assessing whether this Court's review is warranted, this one should not be. Because of the Federal Circuit's caseload and the nature of the tribunals over which the Federal Circuit exercises precedential authority, its EAJA rulings have a very significant impact. The Federal Circuit's docket is weighted heavily toward cases involving the federal government. *See* U.S. Court of Appeals for the Federal Circuit, Adjudications by Merits Panels, by Category, FY 2006, *available at* http://www.fedcir.gov/pdf/ChartAdjudications06.pdf (about 60% of all Federal Circuit merits panel adjudications involve administrative or monetary claims by private parties against the federal government). Thus, not surprisingly, the Federal Circuit has issued reported decisions in literally dozens of EAJA cases involving a wide array of disputes between private parties and

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[4] *See, e.g., Colegrove v. Barnhart*, 435 F. Supp. 2d 218, 220-21 (W.D.N.Y. 2006); *Former Employees of Tyco Electronics, Fiber Optics Div. v. United States*, 350 F. Supp. 2d 1075, 1093-94 (C.I.T. 2004); *Samuel v. Barnhart*, 316 F. Supp. 2d 768, 780-82 (E.D. Wis. 2004); *Sorenson v. Concannon*, 161 F. Supp. 2d 1164, 1176 (D. Or. 2001); *DiGennaro v. Bowen*, 666 F. Supp. 426, 431 (E.D.N.Y. 1987) (noting that "EAJA awards have repeatedly been allowed for services rendered by paid law students, law clerks and paralegals assisting attorneys" and citing six reported cases); *Holden v. Bowen*, 668 F. Supp. 1042, 1048 (N.D. Ohio 1986) (awarding market rates and expressly rejecting argument to limit award to cost); *see also Bullfrog Films, Inc. v. Catto*, 815 F. Supp. 338, 343 n.8 (C.D. Cal. 1993) (noting that paralegal services are "routinely compensated under the EAJA"). *Contra Glick v. U.S. Civil Service Comm'n*, 567 F. Supp. 1483, 1486 n.5 (N.D. Ill. 1983).

the federal government.[5]

The Federal Circuit has appellate jurisdiction over federal administrative tribunals, such as (in this case) agency Boards of Contract Appeals, and over Article I courts, such as the Court of Federal Claims and the Court of Appeals for Veterans Claims (CAVC), which hears veterans' disability claims. *See* 28 U.S.C. § 1295(1)-(14) (listing types of appellate jurisdiction lodged in the Federal Circuit, including appeals from Court of Federal Claims, Merit Systems Protection Board, and agency Boards of Contract Appeals); 38 U.S.C. § 7292 (providing Federal Circuit jurisdiction over appeals from CAVC); *see also* 38 U.S.C. § 502 (providing judicial review in Federal Circuit of Department of Veterans Affairs regulations). Cases from all of those agencies and courts involve the federal government and all are potentially subject to EAJA.

To use one example, in 2006 alone, the CAVC disposed of 1152 EAJA applications, granting 1105 of them. *See* CAVC Annual Reports, *available at* www.vetapp.gov/documents/Annual_Reports.pdf. And, before the decision below, the CAVC regularly awarded fees for paralegal services at market rates – a practice that now will change unless the decision

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[5]*See, e.g., Scarborough v. Principi*, 541 U.S. 401 (2004) (review of Federal Circuit fee decision arising from veteran's disability claim); *Brickwood Contractors, Inc. v. United States*, 288 F.3d 1371 (2002) (defining "prevailing party" status in case arising from Board of Contract Appeals); *Jones v. Brown*, 41 F.3d 634 (Fed. Cir. 1994) (concerning authority of Court of Veterans Claims to award EAJA fees); *Essex Electro Engin'rs, Inc. v. United States*, 757 F.2d 247 (Fed. Cir. 1985) (concerning authority of Claims Court to award EAJA fees); *Olsen v. Dep't of Commerce*, 735 F.2d 558 (Fed. Cir. 1984) (concerning authority of Federal Circuit to award fees in Back Pay Act appeals from Merit Systems Protection Board).

below is reversed.[6]

The decision below is significant not only because it was issued by the Federal Circuit, with authority over large dockets of cases in which the federal government is a party, but also because the use of paralegals – billed at hourly market rates – is a nearly ubiquitous feature of modern law practice and has been for some time. *See Jenkins*, 491 U.S. at 289 & n.11 (noting that "[s]uch separate billing appears to be the practice in most communities today" and relying on survey of members of national paralegal association).[7] In sum, the Federal Circuit's decision will affect thousands of EAJA fee proceedings both in that court and in the many courts and administrative tribunals over which the Federal Circuit has appellate authority. Review is therefore warranted.

B. The Federal Circuit's Decision Is At Odds With This Court's Decision In *Missouri v. Jenkins* And The Text And Structure Of EAJA.

1. As explained above, in *Missouri v. Jenkins*, 491 U.S.

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[6]*See, e.g., Scarborough v. Nicholson*, 19 Vet. App. 253, 267 (Vet. App. 2005); *Perry v. West*, 11 Vet. App. 319, 331 (Vet. App. 1998); *Adams v. Gober*, 2000 WL 1784504 (Vet. App. 2000).

[7]*See also, e.g., Jacobs v. Mancuso*, 825 F.2d 559, 563 & n.6 (1st Cir. 1987); *Ramos v. Lamm*, 713 F.2d 546, 558-59 (10th Cir. 1983); Am. Bar Ass'n, *Model Guidelines for the Utilization of Paralegal Services* (2004), Guideline 8 & comment thereto, *available at* http://www.abanet.org/legalservices/paralegals/downloads/modelguidelines.pdf (authorizing lawyers to charge market-rate fees for paralegal services, relying in part on *Jenkins*); U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook – Paralegals and Legal Assistants* (2007), *available at* http://www.bls.gov/oco/pdf/ocos114.pdf (describing extensive use of paralegals in most facets of law practice and noting that employment for paralegals "is projected to grow much faster than the average for all occupations through 2014.").

274, the Court considered the compensability of paralegal services as "attorney's fees" under 42 U.S.C. § 1988. The Court first held that, in using the term "attorney's fee," Congress must have meant to compensate not only the work of members of the bar, but the work of others, including paralegals, whose services contribute to the lawyer's work product. *Jenkins*, 491 U.S. at 285. The Court then turned to the question of how those services should be "valuated." *Id.* Relying on its prior fee-shifting precedents holding that attorney fees are to be compensated at "market rate," *see id.* at 285-86 (citing, *e.g.*, *Blum v. Stenson*, 465 U.S. 886, 895 & n.11 (1984); *Hensley v. Eckerhart*, 461 U.S. 424, 447 (1983)), the Court explained that "the prevailing 'market rate' for attorney time is not independent of the manner in which paralegal time is accounted for. Thus, if the prevailing practice in a given community were to bill paralegal time separately at market rates, fees awarded the attorney at market rates for attorney time would not be fully compensatory if the court refused to compensate hours billed by paralegals or did so only at 'cost.'" *Id.* at 286-87 (footnote omitted). Therefore, the Court held, "encouraging the use of lower cost paralegals rather than attorneys wherever possible, . . . 'encourages cost-effective delivery of legal services.'" *Id.* at 288 (quoting *Cameo Convalescent Ctr., Inc. v. Senn*, 738 F.2d 836, 846 (7th Cir. 1984)).

Jenkins applies with full force to EAJA. First, the statutory term "attorney fees" used in EAJA is nearly identical to the term "attorney's fee" construed in *Jenkins*, and, as noted above, the Court has frequently held that similar or identical language in various fee-shifting statutes should generally be construed the same. *Dague*, 505 U.S. at 562; *Zipes*, 491 U.S. at 758 n.2; *see also* Pet. App. 13a n.7 ("The Supreme Court has repeatedly made clear that the various federal attorney's fees statutes should be construed to reach a uniform result.") (quoting *Sacco*

v. United States, 452 F.3d 1305, 1310 (Fed. Cir. 2006)). Moreover, EAJA states that "[t]he amount of fees awarded" "shall be based upon *prevailing market rates* for the kind and quality of the services furnished[,]" 5 U.S.C. § 504(b)(1)(A) (emphasis added); *accord* 28 U.S.C. § 2412(d)(2)(A), while 42 U.S.C. § 1988, the statute at issue in *Jenkins*, authorizes only "reasonable" attorney's fees. If anything, then, a Congress that explicitly required the use of "prevailing market rates" would have been more, not less, likely to have intended that compensation for paralegal services track the market than a Congress that desired only that a fee be "reasonable."

To be sure, if paralegal services have been billed at cost, then they should be reimbursed in that manner under EAJA. *See Jenkins*, 491 U.S. at 285. But if they are billed on an hourly, market-rate basis (as they almost invariably are in modern legal practice), they should be compensated at "prevailing market rates," as the statute provides and *Jenkins* instructs. The Federal Circuit's decision, on the other hand, runs headlong into EAJA's "market rate" language and *Jenkins* by providing that paralegal services must invariably be reimbursed at cost only, even when the market treats paralegal services otherwise.

2. The Federal Circuit majority departed from *Jenkins*' approach and focused on the fact that EAJA authorizes an award of "expenses," in particular on the notion that EAJA draws a distinction between "attorney fees," billed at market rates, and "expenses," billed at cost. *See, e.g.*, Pet. App. 19a ("[W]e hold that paralegal services are not recoverable as fees, but are only recoverable as expenses at the cost to the attorney."); Pet. App. 55a-56a ("[P]ayments for paralegal services under EAJA are not recoverable as 'attorney's fees' but are recoverable as 'expenses,' allowable only at cost."). And, with that purported distinction in mind, the court of appeals

distinguished *Jenkins* on the ground that, in contrast to EAJA's reference to "expenses," section 1988 refers only to "attorney's fees" and does not mention "expenses." *See id.* at 15a.

The Federal Circuit's analysis misreads EAJA's plain text. EAJA authorizes an award of "fees and *other* expenses." 5 U.S.C. § 504(a)(1) (emphasis added); *see also* 28 U.S.C. § 2412(d)(1)(A) (same). "Fees and other expenses" is defined to include "reasonable attorney . . . fees," the amount of which "shall be based upon prevailing market rates for the kind and quality of services furnished . . .." 5 U.S.C. § 504(b)(1)(A); *see also* 28 U.S.C. § 2412(d)(2)(A) (same). Thus, *all* awards under EAJA are awards of "expenses," including awards of "attorney fees." The Federal Circuit's dichotomy between "expenses" awarded at cost, on the one hand, and "attorney's fees" awarded at market rate on the other, is flatly at odds with the statute. Put another way, the term "expenses" cannot, as the Federal Circuit contemplated, mean only those items awardable at cost because that term includes fees, which are awardable at market rate. *See also Marek v. Chesny*, 473 U.S. 1, 9 (1985) (because section 1988 authorizes award of "attorney's fees *as part of* the costs," such fees are "costs" under that section and Federal Rule of Civil Procedure 68). For that reason, the Federal Circuit's reliance on the presence in EAJA of the term "expenses" simply begs the questions – questions already answered in *Jenkins* – as to whether the statutory term "attorney fees" includes paralegal services, and, if so, whether fees for such services may be awarded at market rates.[8]

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[8]Moreover, the panel's reliance on the absence of an express provision for the award of out-of-pocket "expenses" under section 1988 as a basis for distinguishing *Jenkins* overlooks that section 1988 has long been read to authorize recovery of out-of-pocket expenses. *See, e.g., W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 87 n.3 (1991) (noting that courts have

(continued...)

3. The Court's decision in *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83 (1991), strongly supports the position that paralegal services are a part of "attorney fees" under EAJA and, thus, compensable at market rates. First, *Casey* makes clear that *Jenkins* was not, as the Federal Circuit suggested, motivated by an extratextual policy concern that if paralegal services were not shoehorned into "attorney's fees," there would be no basis under 42 U.S.C. § 1988 for recovering them at all because section 1988 does not refer to "expenses." *See* Pet. App. 15a. In holding that expert witness fees are not compensable "attorney's fees" under section 1988, *Casey* rejected the plaintiff's reliance on *Jenkins* as an instance where the Court "permit[ted the] . . . perception of the 'policy' of the statute to overcome its 'plain language.'" *Casey*, 499 U.S. at 99. Instead, the Court explained that *Jenkins* was not a freewheeling exposition of section 1988's policy, but a straightforward interpretation of the term "attorney's fees," which, the Court held, included law clerk and paralegal services because they "had traditionally been included in calculation of the lawyers' hourly rates." *Id.* That textual reading of the term "attorney's fees" in section 1988 is equally applicable to EAJA.

Second, *Casey* explained that a number of fee-shifting statutes expressly authorize an award of both attorney's fees and expert's fees, thus undermining the claim that section 1988's

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[8](...continued)
held that "'reasonable out-of-pocket expenses incurred by the attorney' [are] included in § 1988 'attorney's fee' award") (quoting *Northcross v. Board of Ed. of Memphis Schools*, 611 F.2d 624, 639 (6th Cir. 1979)); *Trs. of the Constr. Indus. & Laborers Health & Welfare Trust v. Redland Ins. Co.*, 460 F.3d 1253, 1257 (9th Cir. 2006); *Dowdell v. City of Apopka, Fla.*, 698 F.2d 1181, 1190-91 (11th Cir. 1983). Thus, if this Court in *Jenkins* had believed that paralegal expenses should be reimbursed at cost, it would have had ample basis to order them treated similarly to the out-of-pocket expenses routinely awarded as "attorney's fees" under section 1988.

reference to "attorney's fees" alone authorized an award of expert fees even though it did not mention them. The Court contrasted that situation with the paralegal services question decided in *Jenkins* on the ground that fee-shifting statutes do *not* single-out paralegal services for special treatment, and it noted that EAJA is no exception:

> We do not know of a single statute that shifts clerk or paralegal fees separately; and even those, *such as the EAJA*, which comprehensively define the assessable "litigation costs" make no separate mention of clerks or paralegals.

Id. at 99-100 (emphasis added). Thus, *Casey* underscores that paralegal services are a part of "attorney fees" compensable at "prevailing market rates" under EAJA because, just like section 1988, EAJA "make[s] no separate mention of clerks or paralegals." *Id.*[9]

4. The Federal Circuit eschewed *Jenkins*' follow-the-market approach based in part on a Senate committee report that cited as an example of an "expense" paralegal time "billed at cost." *See* Pet. App. 19a (quoting S. Rep. No. 98-586, 98th Cong., 2d Sess. 15 (1984)). That reliance was misplaced for several reasons.

First, as explained above, the report's reference to paralegal services as an "expense" tells us nothing about whether those services should be valuated at market rates or at cost, since all items compensable under EAJA are "expenses." Moreover, the

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[9]The Federal Circuit majority acknowledged that, in *Casey*, the Court "reaffirmed its holding in *Jenkins* that paralegal services are included in § 1988's definition of attorney's fees." Pet. App. 11a. The majority quoted virtually all of the *Casey* opinion immediately before and after the blocked quotation reproduced above, *see id.*, but omitted the part most relevant to this case: the sentence that identified EAJA as a statute that, like section 1988, makes no separate mention of paralegal services and thus incorporates those services within the term "attorney fees."

report's reference to paralegal time "billed at cost" reflects only that if paralegal time is billed at cost in the marketplace, it should be compensated under EAJA on that basis. *See Jenkins*, 491 U.S. at 288 ("Nothing in § 1988 requires that the work of paralegals invariably be billed separately. If it is the practice in the relevant market not to do so, or to bill the work of paralegals only at cost, that is all that § 1988 requires."). But if paralegal time is billed on an above-cost hourly basis, then the market should control there as well. The Senate report does not address that scenario or purport to preclude that result.

In any event, the Federal Circuit majority's reliance on supposed "legislative history" fails for a more fundamental reason. The Senate report was prepared for a 1984 version of EAJA passed by the 98th Congress but vetoed by the President. *See* H.R. Rep. No. 99-120, pt. 1, at 6 (1985), *reprinted in* 1985 U.S.C.C.A.N. 132, 134. Thus, the court of appeals erred in its original opinion in stating that "Congress acted to make EAJA permanent in 1984." Pet. App. 19a. In fact, as that court acknowledged later in its supplemental opinion, *id.* at 56a n.2, EAJA was made permanent by the 99th Congress in 1985, and "[n]o Senate Report was submitted with th[e] legislation." 1985 U.S.C.C.A.N. 132. The House committee report that accompanied the bill that was actually enacted in 1985 makes no mention of the treatment of paralegal services. *See id.* at 132-57.

If legislative history may ever serve as legitimate evidence of congressional intent, it may do so only because it is presumed to have been ratified by Congress and the President when the relevant legislation was enacted. *See* Jonathan R. Siegel, *The Use of Legislative History in a System of Separated Powers*, 53 Vand. L. Rev. 1457, 1522 (2000); *cf. Sullivan v. Finkelstein*, 496 U.S. 617, 631-32 (1990) (Scalia, J., concurring). That plainly did not occur with respect to the 1984

report cited by the majority. The Federal Circuit's assertion that the Senate report is "pertinent" nonetheless because the President's veto reflected concern about a topic other than paralegal services and that the enacted 1985 legislation was otherwise "nearly identical" to the failed 1984 legislation, *see* Pet. App. 56a n.2, is a non sequitur: Its defense of the 1984 report does not attempt to justify how a committee report produced to accompany legislation voted on by one Congress could have been ratified by *another* Congress that did not produce that report, did not enact the legislation accompanying that report, and never referred to the relevant issue in its own legislative history.

5. Our position comports with *Jenkins*' view that relying on market forces "encourages cost-effective delivery of legal services," as Senior Judge Plager noted in dissent. Pet. App. 23a; *accord Miller*, 983 F.2d at 862; *Jean*, 863 F.2d at 778. The majority below claimed that this rationale does not apply to EAJA in light of EAJA's cap on hourly rates. Pet. App. 18a. In its view, if market rates are awarded for paralegal services, the cap will cause the EAJA rates of paralegals to approach those of lawyers, inducing overuse of paralegals and promoting inefficiency.

This argument founders on multiple fronts. First, the Federal Circuit's approach failed to recognize that the issue before it was one of statutory construction, not economic theory. And "[t]o interpret accurately" Congress's intent, a court should not read statutes "as if they were written today, for to do so would inevitably distort their intended meaning." *Goldstein v. California*, 412 U.S. 546, 564 (1973). Thus, the efficiency rationale should be evaluated not by asking what would promote perfect competition in today's legal economy, but what Congress meant in requiring use of "prevailing market rates" (subject to a dollar-per-hour cap) when it enacted and

reenacted EAJA in 1980 and 1985, respectively. In those days, market rates for paralegals were far below the EAJA cap – which was then $75 per hour plus adjustments from the date of enactment for increases in the cost of living. *See, e.g., Burt v. Heckler*, 593 F. Supp. 1125, 1133 (D.N.J. 1984) ($25 per hour for paralegal services); *Holden*, 668 F. Supp. at 1048 ($30 per hour); *DiGennaro*, 666 F. Supp. at 433 ($25 per hour and citing similar cases); *In re Chicken Antitrust Litig.*, 560 F. Supp. 963, 972, 975 (N.D. Ga. 1980) ($25 per hour). Thus, there is every reason to think that Congress believed that the use of paralegals was highly efficient and no reason to think that Congress was envisioning a world in which paralegal rates and (capped) lawyer rates had converged.[10]

Second, even today, in much of the country, paralegal rates are well below the EAJA inflation-adjusted cap (now about $160 per hour) at which lawyers' time is generally compensated. *See, e.g., Scarborough*, 19 Vet. App. at 267 (award for paralegal services at $60 per hour and lawyers' services at $133 to $155 per hour).

Finally, the panel majority erred in any event by focusing solely on the supposedly distorted incentives produced by the EAJA cap as opposed to market incentives more generally. Quite apart from EAJA, law firms use paralegals because doing so enables the firms to provide their overall product – legal services – at a lower overall cost to their clients. In cases subject to EAJA, if paralegal services are recoverable only at cost, all other things being equal, firms will be less likely to use paralegals, and more likely to use lawyers, than would be the

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[10]The efficiency rationale for use of paralegals was well understood at the time of EAJA's enactment. *See In re Chicken*, 560 F. Supp. at 977 ("The advent and widespread use of the paraprofessional has meant that the cost of effective legal counsel has been reduced and its availability enhanced without impairing the quality or delivery of legal services.").

case if paralegal services were compensable at market rates, undermining the efficiency that use of paralegals is intended to achieve. Thus, even if, in light of the cap, EAJA fees do not fully replicate the market, prohibiting market-rate recovery for paralegal services, as did the Federal Circuit, would further distort the market and promote the inefficiency rejected by this Court in *Jenkins*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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United States Court of Appeals for the Federal Circuit

2006-1055

RICHLIN SECURITY SERVICE COMPANY,
Appellant,

v.

Michael Chertoff,
SECRETARY OF HOMELAND SECURITY,
Appellee.

DECIDED: December 26, 2006

Before RADER, Circuit Judge, PLAGER, Senior Circuit Judge, and DYK, Circuit Judge.

Opinion for the court filed by Circuit Judge DYK. Dissenting opinion filed by Senior Judge PLAGER.

DYK, Circuit Judge.

Richlin Security Service Company ("Richlin") appeals a Department of Transportation Board of Contract Appeals ("Board")[1] decision that, under the Equal Access to Justice Act,

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[1] The Department of Justice and later the Department of Homeland Security designated the Department of Transportation Board of Contract Appeals to hear and decide appeals from their contracting officers' final decisions arising under the Contract Disputes Act of 1978, Pub. L. No.

5 U.S.C. § 504 (2000) ("EAJA"), paralegal services may only be reimbursed at the cost to the attorney and not at the market rate. Richlin Sec. Serv. Co., DOTBCA No. 3034E and 3035E, 04-2 BCA ¶ 32,789 (2005). Because we agree that EAJA only permits reimbursement for paralegal services at cost, we affirm.

BACKGROUND

I

This is the fifth time this case has come before this court.[2] The previous decisions concerned two fixed-price contracts executed by Richlin and the then Immigration and Naturalization Service ("INS")[3] in April 1990 and August 1991. Richlin Sec. Serv. Co. v. Chertoff, 437 F.3d 1296, 1297 (Fed. Cir. 2006). Pursuant to the contracts, Richlin agreed to provide guard services for detainees at the Los Angeles International Airport. Id. As the result of a mutual mistake, the contracts misclassified Richlin's employees as "Guard I" rather than "Guard II" for purposes of the wage classification scheme of the Service Contract Act, 41 U.S.C. §§ 351 et seq. (2000). The error resulted in the underpayment of Richlin's employees. Id.

In February 1995, the Department of Labor determined that

95-563, 41 U.S.C. § 601 et seq. See 63 Fed. Reg. 16118, 16134 (Apr. 2, 1998); 68 Fed. Reg. 67868, 67884 (Dec. 4, 2003).

[2] Meissner v. Richlin Sec. Serv. Co., No. 97-1472, 1998 WL 228175 (Fed. Cir. May 7, 1998); Richlin Sec. Serv. Co. v. Rooney, No. 00-1134, 2001 WL 744463 (Fed. Cir. July 2, 2001); Richlin Sec. Serv. Co. v. Ridge, No. 03-1344, 2004 WL 1153349 (Fed. Cir. May 14, 2004); Richlin Sec. Serv. Co. v. Chertoff, 437 F.3d 1296 (Fed. Cir. 2006).

[3] INS was formerly part of the Department of Justice. Effective March 1, 2003, INS became a part of the Department of Homeland Security ("DHS"). 6 U.S.C. § 291 (2000). The Bureau of Immigration and Customs Enforcement within the DHS assumed the duties of the former INS.

Richlin's employees were entitled to back wages from Richlin. Id. Richlin then filed a claim against the government for over $1.5 million in back wages and associated taxes on the ground that the original contract price should have been higher to account for the increased wages and associated costs. Id. The contracting officer denied Richlin's claim, and Richlin appealed to the Board. Id. at 1297-98. The government resisted reformation of the contract and defended the subsequent appeals on the ground that Richlin bore the risk of misclassifying its employees. See Richlin Sec. Serv. Co., DOTBCA No. 3034E and 3035E, 04-2 BCA ¶ 32,789. After a series of appeals to the Board and this court, the Board awarded Richlin the amount of the additional wages, payroll taxes, and workers compensation premiums that Richlin was required to pay. Richlin Sec. Serv. Co., 02-2 BCA ¶ 31,876, 2002 WL 1042294 (DOTBCA 2002). We affirmed the Board's decision. Richlin Sec. Serv. Co. v. Ridge, No. 03-1344, 2004 WL 1153349 (Fed. Cir. May 14, 2004).

After this court affirmed, Richlin timely submitted an application for reimbursement of attorney's fees, expenses, and costs to the Board pursuant to EAJA. See Richlin Sec. Serv. Co. v. Ridge, No. 03-1344, 2004 WL 1153349 (Fed. Cir. May 14, 2004). This appeal concerns reimbursement under EAJA for paralegal services used in the course of the underlying cases (and in preparing the EAJA application).

II

Gilbert J. Ginsburg is an attorney who began representing Richlin in 1994 after the underlying case had been litigated for some time. Over the course of his representation, Ginsburg used paralegals and separately billed his client (Richlin) for their services at market rates. Between 1994 and May 23, 2003 (when Richlin filed its EAJA application), Ginsburg's paralegal billing rates increased from $50 per hour to $80 per hour to $95

per hour to $135 per hour.

EAJA provides:

> [a]n agency that conducts an adversary adjudication shall award, to a prevailing party . . . fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust.

5 U.S.C. § 504(a)(1) (emphasis added). Subsection 504(b)(1) defines the term "fees and expenses":

> "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the agency to be necessary for the preparation of the party's case, and reasonable attorney or agent fees (The amount of fees awarded under this section shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the agency involved, and (ii) attorney or agent fees shall not be awarded in excess of $125 per hour unless the agency determines by regulation that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents for the proceedings involved, justifies a higher fee.)

(emphasis added). To recover "fees and expenses," the prevailing party must submit an application to the agency within 30 days of "a final disposition." 5 U.S.C. § 504(a)(2). The application must include "an itemized statement from any attorney, agent, or expert witness representing or appearing in

behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed." Id.

In the EAJA application, Richlin sought reimbursement for $51,793.75 in attorney's fees for work on the underlying cases and $14,225.00 in attorney's fees for preparing the EAJA application. Richlin also applied for reimbursement of paralegal services at the rate billed to Richlin for paralegal time, with the exception of services for the period after June 1, 2004 (when Ginsburg's billing rate for paralegals had increased to $135 per hour). Although it is unclear how Richlin computed the amount claimed for paralegal services, it appears that for services performed after June 1, 2004, Richlin capped the fee request at $95 per hour. Richlin ultimately sought reimbursement for $45,141.10 for 523.8 hours of paralegal time for work on the underlying cases. It also sought an additional $6,760.00 for 68.2 hours of paralegal work preparing the EAJA application.

III

On June 30, 2005, the Board issued a decision finding that "Richlin ha[d] established that it meets the size and net worth requirements for an EAJA award and . . . that Richlin was a prevailing party." The Board then concluded that the government's denial of Richlin's claim was not "substantially justified" under EAJA. See Richlin Sec. Serv. Co., DOTBCA No. 30334E and 3035E, 04-2 BCA ¶ 32,789. The Board found that the government's argument that Richlin bore the risk of the mutual mistake of misclassifying its employees was not substantially justified because the contracts expressly placed the risk of misclassification on the government. Accordingly, the Board held that Richlin was entitled to recover attorney's fees, awarding $43,313 in attorney's fees for the underlying cases and $7,126 in attorney's fees for the preparation of the EAJA application.

Regarding reimbursement for paralegal services, the Board

reasoned that EAJA does not expressly provide for the reimbursement of paralegal services at the market rate and that the common definition of "attorney" does not include paralegals. Moreover, the Board noted that EAJA's legislative history defines "expenses" to include "paralegal time (billed at cost)." S. Rep. No. 98-586, 98th Cong., 2d Sess., at 15 (Aug. 8, 1984). As there was no information in the record before the Board regarding the actual cost to Ginsburg of the paralegal services, the Board took "judicial notice of paralegal salaries in the Washington D.C. area as reflected on the internet." The Board awarded paralegal expenses at a rate of $35 per hour, which it found to be "a reasonable cost to the firm." Accordingly, for paralegal services in connection with underlying cases, the Board awarded $9,394. For services in connection with the EAJA application, the Board awarded $1,200.

Richlin timely appealed. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(10) (2000).

DISCUSSION

We review the Board's interpretation of EAJA without deference. Brickwood Contractors, Inc. v. United States, 288 F.3d 1371, 1376 (Fed. Cir. 2002); Fanning, Phillips and Molnar v. West, 160 F.3d 717, 720 (Fed. Cir. 1998). As the Supreme Court has held repeatedly, EAJA constitutes a waiver of sovereign immunity and should be strictly construed. See, e.g., Ardestani v. Immigration and Naturalization Serv., 502 U.S. 129, 137 (1991). EAJA "lifts the bar of sovereign immunity for award of fees in suits brought by litigants qualifying under the statute, [but] does so only to the extent explicitly and unequivocally provided." Levernier Const., Inc. v. United States, 947 F.2d 497, 502 (Fed. Cir. 1991) (quoting Fidelity Construction Co. v. United States, 700 F.2d 1379, 1386 (Fed. Cir. 1983)). Thus, we must strictly construe EAJA's fee shifting

provision in favor of the government.

I

EAJA generally provides that a "prevailing party" may recover "fees and other expenses" where the position of the government was not "substantially justified." 5 U.S.C. § 504(a)(1). Subsection 504(b)(1)(A) defines "fees and other expenses" and provides that:

> "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the agency to be necessary for the preparation of the party's case, and reasonable attorney or agent fees.

The question here is whether, under EAJA, amounts for paralegal services may be recovered at market rates as part of "fees" or whether they are recoverable only at cost as part of the recovery of "expenses."

As a preliminary matter, we note that EAJA provides that "'fees and expenses' includes the reasonable expenses of expert witnesses . . . and reasonable attorney or agent fees." 5 U.S.C. § 504(b)(1)(A) (emphasis added). Richlin does not appear to argue that paralegal services should be reimbursed on the theory that the statute allows recovery of any and all types of fees. Rather, Richlin argues that they are recoverable under the specific category of "attorney's fees." While Congress' use of the term "includes" does raise the possibility that Congress intended to permit reimbursement of other types of fees, we conclude that the statutory text compels a conclusion that EAJA permits only reimbursement of expert, agent, and attorney's fees.

Section 504(a)(2) outlines the requirements for submitting an EAJA application for "an award of fees and other expenses"

and requires "an itemized statement from any attorney, agent, or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed." This language (limiting the types of individuals who may file a statement to attorneys, agents, and experts) contemplates that attorney, agent and expert fees are the only categories of "fees." Moreover, EAJA caps the recovery of attorney and agent fees (capped at $125 per hour subject to a possible cost of living adjustment) and expert witness fees (capped at the highest rate that the agency pays expert witnesses). 5 U.S.C. § 504(b)(1)(A). It would be anomalous to cap the recovery of expert, agent, and attorney's fees and not cap other types of fees. The fact that only attorney, agent and expert fees are capped suggests that no other types of fees are to be awarded. See Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 126 S. Ct. 2455, 2461 (2006) (discussed below). Finally, the legislative history does not suggest that Congress was concerned with any other types of fees. In a Senate report issued pursuant to the 1984 reauthorization of EAJA, Congress sought to clarify the definition of "fees and expenses." S. Rep. No. 98-586, 98th Cong., 2d Sess., at 15 (Aug. 8, 1984). The report noted that concern was expressed regarding whether "fees and expenses" included "reasonable out-of-pocket expenses." Id. In noting that out-of-pocket expenses were reimbursable, the Senate report stated that EAJA permitted "the award of 'reasonable expenses of the attorney, agent, or witness' as a separate item, if the attorney, agent, or witness ordinarily charges clients for such expenses." Id. (quoting 46 Fed. Reg. 32900, 32913 (June 25, 1981)). This again suggests that fees of witnesses, attorneys, and agents are the only fees that Congress contemplated. See Cook v. Brown, 68 F.3d 447, 450-51 (Fed. Cir. 1995). For these reasons, we conclude that paralegal services may not be reimbursed under EAJA as part of "fees" in general.

Richlin also does not argue that paralegal services should be reimbursed as part of "agent fees." "EAJA expressly recognizes two different and mutually exclusive types of representative, 'agents' and 'attorneys,' and authorizes recovery of agent fees only in agency, not court, proceedings." Cook, 68 F.3d at 451. According to the legislative history, "[a]n 'agent fee' may be awarded for the services of a non-attorney where an agency permits such agents to represent parties who come before it." H.R. Rep. No. 96-1418, at 14 (1980), reprinted in 1980 U.S.C.C.A.N. 4984, 4993. There is no suggestion that the paralegals involved here were authorized to represent clients before the Board. Thus it is apparent that their services should not be reimbursed as "agent fees."

As paralegal services are neither recoverable under the general category of "fees" nor as "agent fees," we must consider whether they fall within the definition of "attorney's fees."

II

The Supreme Court has not addressed the issue of whether paralegal services are included in "attorney's fees" under EAJA. However, it has addressed the question under section 1988 of the Civil Rights Attorney's Fees Awards Act ("§ 1988"). 42 U.S.C. § 1988. Section 1988 provides that "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." See also § 706(k) of Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 261, 42 U.S.C. § 2000e-5(k) (July 2, 1964) (containing identical language to § 1988). In Missouri v. Jenkins, 491 U.S. 274, 275 (1989), the Supreme Court considered whether a "reasonable attorney's fee" award under § 1988 should "compensate the work of paralegals and law clerks by applying the market rate for their work." The Supreme Court reasoned that the term "reasonable attorney's fee" could not "have been meant to compensate only for work performed

personally by members of the bar." Id. at 285. Rather, the Court found that the term "reasonable attorney's fee" refers to "a reasonable fee for the work product of the attorney." Id. This includes the work of those "whose labor contributes to the work product for which an attorney bills her client," including the work of paralegals. Id. The Court stated that "[w]e thus take as our starting point the self-evident proposition that the 'reasonable attorney's fee' provided for by statute should compensate the work of paralegals." Id.

After the Court determined that paralegal services were included in the definition of attorney's fees, it turned to the definition of "reasonable." Id. The Court noted that "[i]n determining how other elements of the attorney's fee are to be calculated, we have consistently looked to the marketplace as our guide to what is 'reasonable.'" Id. Thus, a reasonable fee under § 1988 "is one calculated on the basis of rates and practices prevailing in the relevant market"; "one that grants the successful civil rights plaintiff a fully compensatory fee"; and one that is "comparable to what is traditional with attorneys compensated by a fee-paying client." Id. at 286 (internal citations and quotation marks omitted).

The Court reasoned that to ensure that the fee is "fully compensatory," the reimbursement rate must depend on how attorneys in the community customarily bill for paralegal time. Id. at 286-87. On one hand, if the prevailing practice is to separately bill for paralegal time at the market rate, reimbursement at cost "would not be fully compensatory." Id. at 287. On the other hand, a fee award at the market rate "would be too high" if the prevailing practice was to bill for paralegal time at cost. Id. The Court held that reimbursement for paralegal services would depend on which of the two approaches prevailed in the community. Overall, the Court concluded that allowing reimbursement at the prevailing rate

would encourage the use of paralegals which "encourages cost-effective delivery of legal services and, by reducing the spiraling cost of civil rights litigation, furthers the policies underlying civil rights statutes." Id. at 288 (internal citations and quotation marks omitted).

Following the Supreme Court's decision in Jenkins, the Court in West Virginia Univ. Hospitals, Inc. v. Casey, 499 U.S. 83 (1991), considered whether § 1988 permits the recovery of "expert's fees" as part of a "reasonable attorney's fee." In holding that expert fees were not recoverable as attorney's fees under § 1988,[4] the Court reaffirmed its holding in Jenkins that paralegal services are included in § 1988's definition of attorney's fees. Id. at 99-100. The Court noted that, unlike statutes that separately shift expert fees, "[w]e do not know of a single statute that shifts clerk or paralegal fees separately." Id. at 99-100. The Court explained that "giving the losing argument the benefit of the doubt" the term "attorney's fees" in Jenkins was "genuinely ambiguous; and we resolved that ambiguity not by invoking some policy that supersedes the text of the statute, but by concluding that charges of this sort had traditionally been included in attorney's fees." Id. at 100.

Since West Virginia and Jenkins, neither the Supreme Court nor this court has considered the paralegal services issue under EAJA. In Levernier Constr., Inc. v. United States, 947 F.2d 497 (Fed. Cir. 1991), we held that a court cannot apply a cost of living adjustment (COLA) to the reimbursement of paralegal services under EAJA, 28 U.S.C. § 2412(d). In so holding, we assumed that "EAJA allows for the recovery of paralegal fees for whom the 'prevailing market rate' is less than

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[4] In response to the Supreme Court's decision in West Virginia, Congress amended § 1988 to permit the recovery of expert fees. Pub. L. No. 102-166, § 113, 105 Stat. 1071, 1079 (1991).

$75 per hour," but rejected the notion that there was any basis for a COLA adjustment even if paralegal services were recovered at the market rate.[5] Id. at 503. However, the issue of whether paralegal fees are "attorney's fees" was neither argued nor decided. Under such circumstances, Levernier's statement and the assumption on which it proceeded is not binding authority. Boeing N. Am., Inc. v. Roche, 298 F.3d 1274, 1282 (Fed. Cir. 2002) (stating that "under our established precedent we are not bound by" a prior panel decision where "the issue was neither argued nor discussed in [the] opinion"); see also United States v. County of Cook, Illinois, 170 F.3d 1084, 1088 (Fed. Cir. 1999); Nat'l Cable Television Ass'n, Inc. v. Am. Cinema Editors, Inc., 937 F.2d 1572, 1580 (Fed. Cir. 1991) (citing Webster v. Fall, 266 U.S. 507, 511 (1925)).

Richlin also seeks support from the Eleventh Circuit decision in Jean v. Nelson, 863 F.2d 759, 778 (11th Cir. 1988), aff'd on other grounds, Immigration and Naturalization Serv. v. Jean, 496 U.S. 154 (1990). While Jean concluded that paralegal services must also be included within "attorney's fees" under EAJA, there was no indication that the paralegal services issue was argued, and the Eleventh Circuit simply followed a previous Eleventh Circuit decision (which predated the Supreme Court's decision in Jenkins and West Virginia) holding that, under Title VII, paralegal expenses are reimbursable at the market rate. See Allen v. United States Steel Corp., 665 F.2d 689, 697 (5th Cir. 1982) (holding in a Title VII case that paralegal services are included in "attorney's fees" and are not "costs" under Fed. R. Civ. P. 54(d)). The Jean court's discussion of paralegal services was limited to a short paragraph that addressed neither the statutory language nor the purpose of

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[5] When Levernier was decided, the EAJA attorney's fee cap was $75. It has now increased to $125.

EAJA. Id. As we now discuss, we do not find the Jean decision persuasive.[6]

III

Both EAJA and § 1988 provide for the recovery of "attorney's fees," and the Supreme Court has generally stated that "fee-shifting statutes' similar language is a strong indication that they are to be interpreted alike." Indep. Fed. of Flight Attendants v. Zipes, 491 U.S. 754, 758 n.2 (1989) (internal citations and quotation marks omitted).[7] However, where, as here, there are differences in the surrounding language, structure and purpose of the statute, the Supreme Court has interpreted identical language in different statutes differently. For example, in United States v. Reorganized CF&I Fabricators of Utah, Inc., 518 U.S. 213 (1996), the Supreme Court held that a payment to the IRS was a tax under Internal Revenue Code section 4971(a) but was a "penalty" for purposes of awarding priority status under the Bankruptcy Code, 11

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[6] We also find unpersuasive the few Board of Contract Appeals' decisions that allow recovery of paralegal services at market rates. These decisions fail to consider the statutory language, purpose and legislative history of EAJA. See e.g., Kumin Assoc., Inc., 98-2 BCA ¶ 30,008 (LBCA 1998); Lamb Eng'g & Contr. Co., 98-2 BCA ¶ 30,075 (EBCA 1998); Adams Constr. Co., 98-1 BCA ¶ 29,479 (VABCA 1997); Spectrum Leasing Corp., 93-1 BCA ¶ 25,317 (GSBCA 1992).

[7] See also Marek v. Chesny, 473 U.S. 1, 8-9 (1985); Northcross v. Memphis Bd. of Education, 412 U.S. 427, 428 (1973); Sacco v. United States, 452 F.3d 1305, 1310 (Fed. Cir. 2006) ("The Supreme Court has repeatedly made clear that the various federal attorney's fees statutes should be construed to reach a uniform result.").

U.S.C. § 507(a)(7)(E) (1988).[8]

This principle has been applied in the area of fee-shifting statutes. In Fogerty v. Fantasy, Inc., 510 U.S. 517 (1994), the Court considered the fee-shifting provision of the Copyright Act of 1976, 17 U.S.C. § 505, which provides that "the court may . . . award a reasonable attorney's fee to the prevailing party as part of the costs." The issue was whether the same standard applied to prevailing plaintiffs as to prevailing defendants. Id. at 520. The Court had previously interpreted identical language in § 706(k) of Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 8 Stat. 261, 42 U.S.C. § 2000e-5(k) (July 2, 1964), to require a more favorable standard for prevailing plaintiffs than for prevailing defendants. See Christiansburg Garmet Co. v. EEOC, 434 U.S. 412, 422 (1978). The Court nonetheless rejected that approach for the Copyright Act, reasoning that "the goals and objectives of the two Acts are . . . not completely similar." Fogerty, 510 U.S. at 524. While plaintiffs under Title VII can "ill afford to litigate their claims against defendants with more resources," both plaintiffs and defendants under the Copyright Act "can run the gamut from corporate behemoths to starving artists." Id. (internal citations and quotation marks omitted).

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[8] The Supreme Court has held that even identical language in the same statute may be interpreted differently. See SKF USA Inc. v. United States, 263 F.3d 1369, 1383 (Fed. Cir. 2001) ("there have been rare occasions when the Supreme Court itself has construed the same term differently in different sections of the same statute") (citing Dewsnup v. Timm, 502 U.S. 410, 417 (1992)); see also Dewsnup v. Timm, 502 U.S. 420, 417-18 (1992) (interpreting the term "allowed secured claim" in sections 506(a) and 506(d) of the Bankruptcy Code, 11 U.S.C. § 506, and holding that the two provisions need not be interpreted consistently because statutory text was ambiguous and the legislative history supported different interpretations).

Here too we conclude that the different statutes require different interpretations. Initially we note that the language of the two statutes is different in important respects. Under § 1988 the effect of denying "fee" recovery for paralegal services would likely have been to deny recovery entirely. Section 1988 provides for the recovery of only attorney's fees and costs, not expenses. In Jenkins, the majority did not dispute the dissent's contention that "[a]bsent specific statutory authorization" the recovery of costs is limited to those innumerated in 28 U.S.C. § 1920. 491 U.S. at 297. As paralegal expenses were not included in the list of "costs," paralegal services could not be awarded unless they were considered part of "fees." In this respect, EAJA differs from § 1988 by also providing for the recovery of "expenses."

Here also, as in Fogerty, we conclude that "the goals and objectives" of Title VII and the statute before us are not the same. The purpose of § 1988 was "to encourage litigation protecting civil rights" and "to enable potential plaintiffs to obtain the assistance of competent counsel in vindicating their rights." Kay v. Ehrler, 499 U.S. 432, 436 (1991); see also Ortiz v. Regan, 980 F.2d 138, 140 (2d Cir. 1992) (stating that § 1988 "was designed to allow private individuals a meaningful opportunity to vindicate civil rights violations"). The underlying purpose of "civil rights statutes [is to] vindicate public policies 'of the highest priority' . . . yet 'depend[s] heavily upon private enforcement.'" Buckhannon Bd. and Care Home, Inc. v. W. Va. Dept. of Health and Human Res., 532 U.S. 598, 635 (2001) (quoting S. Rep. No. 94-1011, p. 2-3 (1976)). Thus, people "who bring meritorious civil rights claims, in this light, serve as 'private attorneys general.'" Id. at 635-36.

The purpose of EAJA is narrower. EAJA was enacted because "the expense of correcting error on the part of the government should not rest wholly on the party whose

willingness to litigate or adjudicate has helped to define the limits of federal authority." H.R. Rep. No. 96-1418, at 10 (1980). In other words, the purpose of EAJA is to "diminish[] the deterrent effect of the cost of seeking review of agency action." Sullivan v. Hudson, 490 U.S. 877, 878 (1989).[9] Thus the purpose of EAJA is not to reimburse all of the costs of the prevailing party but to reimburse costs only when the government's position was not substantially justified and even then to provide only for partial reimbursement. Since the purpose of EAJA was not to make the prevailing party whole, it is consistent with that purpose to disallow full reimbursement for paralegal fees.

Indeed, it would be inconsistent with the purpose of EAJA to reimburse paralegal fees at the full hourly rate charged to the client limited only by the statutory cap on attorney's fees. When enacted in 1980, EAJA included a $75 cap on attorney's fees. In 1996 Congress raised the cap to $125. Pub. L. No. 104-121, § 231, 110 Stat. 847, 862 (Jan. 3, 1996). Given that attorney's fees generally far exceed paralegal fees, it seems unlikely that Congress would have capped paralegal services at the same level as attorney's fees. It also seems unlikely that Congress would have set the maximum fee for paralegals as high as $75

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[9] See, e.g., Abbs v. Principi, 237 F.3d 1342, 1349 (Fed. Cir. 2001) ("Congress enacted the EAJA to diminish the costs of litigating against the government."); Krecioch v. United States, 316 F.3d 684, 686 (7th Cir. 2003) ("The purpose of the EAJA is to eliminate the financial disincentive for people to challenge unreasonable governmental actions."); Sec. & Exch. Comm'n v. Price Waterhouse, 41 F.3d 805, 809 (2d Cir. 1994) ("The provisions of the EAJA, despite its somewhat misleading name, are designed to compensate victims of unjustified litigation by the Government from some of the burdensome expenses and costs to which they were subjected by the Government's taking of unreasonable positions." (emphasis in original)).

per hour (the equivalent of about $185 in today's dollars)[10] – a level that likely exceeded the then-current billing rate for paralegal services[11] – given the overall desire to cap allowable fees below market rates.

A similar structural feature led the Supreme Court in Arlington Central School District Board of Education, 126 S. Ct. at 2461, to conclude that expert witness fees were not recoverable under the Individuals with Disabilities Education Act ("IDEA"). IDEA directs that "in any action or proceeding brought under this section, the court in its discretion, may award reasonable attorney's fees as part of the costs" to the parents of "a child with a disability" who is the "prevailing party." 20 U.S.C. § 1415(i)(3)(B). The respondents argued that the Supreme Court should interpret "costs" to include expert costs. Arlington, 126 S. Ct. at 2459. In holding that "costs" do not include expert costs, the Court noted that the statute, in sections 1415(i)(3)(C)-(G), "contains detailed provisions that are designed to ensure that [attorney's fees] awards are indeed reasonable."[12] Id. at 2460. "The absence of any comparable

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[10] See U.S. Dept. of Labor, Bureau of Labor Statistics, Consumer Price Index: September 2006 (Oct. 18, 2006).

[11] Five years after EAJA was enacted (when EAJA's statutory cap was still $75 per hour), paralegals' time appeared to have been billed at an average hourly rate of $44 in metropolitan areas with populations over one million. Brief for Respondents, Missouri v. Jenkins, 491 U.S. 274 (1989) (No. 88-64) (citing a 1986 "Survey of Law Firm Economics" that contains 1985 data); see also In re Agent Orange Product Liability Litigation, 818 F.2d 226, 231 (2d Cir. 1987) (citing national hourly rates for attorney's from 1980-1984 as $150 for partners and $100 for associates).

[12] Subsection 1415(i)(3)(C) states that "[f]ees awarded under this paragraph shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No

provisions relating to expert fees strongly suggests that recovery of expert fees is not authorized." Id. As the structure of EAJA also contains restrictions to ensure that the award of attorney's fees are reasonable but no comparative provision with respect to paralegal fees (and the attorney's fees cap provides no meaningful limit on paralegal fees), the Supreme Court's decision in Arlington supports the view that Congress did not intend to include paralegal services within the definition of attorney's fees under EAJA.

The allowance of paralegal fees without a meaningful cap would, moreover, create a perverse incentive. If the attorney did the work himself, he would be limited to $125 per hour – likely far less than his market rate. If he referred the work to a paralegal, he could recover at or near the full market rate for paralegals. The effect would be to encourage lawyers to refer work to paralegals so that full fee recovery could be obtained. This would create a different incentive than the one relied on by the Supreme Court in Jenkins. There the Court concluded that allowing paralegal fee recovery would result in the more efficient performance of legal services by allowing lawyers to use paralegals at a lower hourly rate in accordance with their normal practice. See Jenkins, 491 U.S. at 288. Here treating paralegal fees as attorney's fees would distort the normal allocation of work and result in a less efficient performance of legal services.

Finally, there is also no legislative history supporting the

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bonus or multiplier may be used in calculating the fees awarded under this subsection." Subsections 1415(i)(3)(D) and (E) provide that no fees will be awarded for certain legal services, including services performed after certain settlement offers, unless the parent was "substantially justified in rejecting the settlement offer." Subsections 1415(i)(3)(F) and (G) list the conditions for when the award of attorney's fees should be reduced, e.g. when the parent "unreasonably protracted the final resolution of the controversy."

award of paralegal fees at market rates. Quite the contrary, the legislative history of EAJA supports the conclusion that paralegal services are expenses and not fees (or costs). When Congress acted to make EAJA permanent in 1984, the Senate report accompanying the bill clarified the meaning of "fees and expenses." S. Rep. No. 98-586, 98th Cong., 2d Sess., at 15 (Aug. 8, 1984). The Senate report stated that "though no language change takes place, clarification of the term [fees and expenses] is necessary" because there was a dispute about whether "fees and expenses," as listed in the statute, is exclusive or whether it included other reasonable expenses. Id. The Senate report clarified that the term "fees and expenses" is inclusive and permits the reimbursement of all "reasonable expenses." The report then stated that "[e]xamples of the type of expenses that should ordinarily be compensable include paralegal time (billed at cost)." Id. This language strongly suggests that Congress did not intend to include paralegal expenses in the definition of "attorney's fees," but rather intended that paralegal fees be billed as expenses limited to the attorney's cost.

CONCLUSION

For these reasons, we hold that paralegal services are not recoverable as fees, but are only recoverable as expenses at the cost to the attorney. Richlin does not challenge the Board's $35 per hour cost figure. Accordingly, we affirm the Board of Contract Appeals' award.

AFFIRMED

COSTS

No costs.

United States Court of Appeals for the Federal Circuit

2006-1055

RICHLIN SECURITY SERVICE COMPANY,
Appellant,

v.

Michael Chertoff,
SECRETARY OF HOMELAND SECURITY,
Appellee.

PLAGER, Senior Circuit Judge, dissenting.

The EAJA statute uses the phrase "reasonable attorney . . . fees" to describe one element of the award that can be made under this fee-shifting statute.[1] Other than noting that such fees shall be based upon prevailing market rates, the statute itself is of little help in answering the question of whether and how an award for paralegal services may be compensated. In my view our role is not to pick an answer we prefer and distinguish away any law that is inconsistent with that answer. Rather, there is law on point that guides our decision and, in the absence of clear Congressional direction, provides an answer that is consistent and defensible as a matter of law. Accordingly I respectfully dissent.

First, the panel's position is at variance with established

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[1] 5 U.S.C. § 504(b)(1)(A).

Supreme Court law. The same question now before us was before the Court in Missouri v. Jenkins: does a fee-shifting statute that provides for "a reasonable attorney's fee" authorize "compensating the work of . . . paralegals . . . at the market rates for their services, rather than at their cost to the attorney." 491 U.S. 274, 284 (1989). Just as EAJA does not address the question in express terms, neither does section 1988 of the Civil Rights Attorney's Fees Awards Act (42 U.S.C. § 1988), the statute at issue in Jenkins. Nevertheless, the Supreme Court's answer to the question of whether fees for paralegals were included under the statute was an unequivocal yes. It is of course obvious that the statutes involved—EAJA in our case and § 1988 in the Jenkins case—are part of different statutory programs with different statutory purposes, but the underlying policy of the fee-shifting provisions is the same: to encourage the vindication of legal rights that otherwise might not be vindicated.

With regard to the scope of the phrase "reasonable attorney's fee," the Supreme Court explained:

> Clearly, "a reasonable attorney's fee" cannot have been meant to compensate only work performed personally by members of the bar. Rather, the term must refer to a reasonable fee for the work product of an attorney. Thus, the fee must take into account the work not only of attorneys, but also of . . . others whose labor contributes to the work product for which an attorney bills her client.

Id. at 285. The position taken by the panel majority in this case, that 'reasonable attorney fees' do not include the work of others who contribute to the work product of the attorney, echoes the view of the lone dissenter on this issue in Jenkins: "[T]he statute itself simply uses the very familiar term 'a reasonable attorney's fee,' which to those untutored in the court's linguistic

juggling means a fee charged for services rendered by an individual who has been licensed to practice law." Id. at 296 (Rehnquist, C.J., dissenting). Whether linguistic juggling or not, the Supreme Court's position on the meaning of the phrase 'attorney's fees' in these fee-shifting statutes leaves little doubt as to how the phrase is to be understood.[2]

Second, in a case decided by this court in 1991, Levernier Construction, Inc. v. United States, 947 F.2d 497 (Fed Cir. 1991), one of the issues before the court was whether, in an award made under EAJA, a cost of living adjustment (COLA) could be applied to paralegal fees awarded at market rates. The court denied the award of the COLA. The court could have reached that result either by concluding that an award of paralegal fees at market rates was not available under EAJA, as the panel here concludes, or by concluding that, even though paralegal fees were awardable, the EAJA statute did not authorize an upward adjustment by way of a COLA. The court did the latter: "[A]lthough the EAJA allows for the recovery of paralegal fees for whom the 'prevailing market rate' is less than $75 per hour [the fee cap at that time], neither the cap on those fees nor the fees themselves may be augmented by a COLA." Id. at 503. Though not analyzed in detail because the Government apparently conceded it, the court thus expressly addressed the issue of paralegal fees and stated its conclusion regarding it.

We can argue over the weight to be given to that conclusion. Though the issue was not argued by the parties, it necessarily was before the court. That predicate issue had to be decided before the COLA question could be; the consequence was to approve the award of paralegal fees, though without the

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[2] Seven of the eight justices who heard the case, including the two who dissented in part, joined the decision on paralegal fees.

COLA. This is not a passing dictum on which the case could be distinguished. I agree that an issue opined about that is not presented by the facts of the case, and neither argued nor discussed, is not a holding binding on later panels. The panel majority is of the view that whether the issue in Levernier was sufficiently or properly analyzed to their satisfaction is a question they should decide. My view is that for now Levernier stands as the law of this circuit, and, if it is to be ignored, especially in light of the Supreme Court's position, that should be done by the court en banc, and not summarily by a panel decision.

Third, and finally, there are sound policy reasons for following Levernier and for adopting the Supreme Court's take of the case, even if we thought we had a choice. As the Court noted, by encouraging the use of lower cost paralegals rather than attorneys wherever possible, permitting market-rate billing of paralegal hours encourages cost-effective delivery of legal services and, by reducing the spiraling cost of rights litigation, furthers the policies underlying such rights-vindicating statutes.[3]3 See Jenkins, 491 U.S. at 288. This is the view of our sister circuit who addressed this same question both in the civil rights context and in the EAJA context, and concludes as I do,[4] and of the several Board of Contract Appeals decisions that allow recovery of paralegal services at market rates.[5]

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[3] The question of whether caps should be imposed on the fees, and any "anomalies" that may result therefrom, is a question of legislative policy, not judicial rationalizing.

[4] Jean v. Nelson, 863 F.2d 759, 778 (11th Cir. 1988).

[5] See e.g., Kumin Assocs., Inc., 98-2 BCA ¶ 30,008 (LBCA 1998) (citing and following Levernier); see also maj. op. at 13 n.6 (and cases cited therein).

Consistent with established law I would reverse the Board decision, and remand for the Board to determine whether local billing practices support a fee award for the paralegal services at market rates (see the discussion of this point in Jenkins, 491 U.S. at 285-87), and what the award amount should be.

UNITED STATES
DEPARTMENT OF TRANSPORTATION
BOARD OF CONTRACT APPEALS
WASHINGTON, D.C.

Docket Nos. 3034E, 3035E
Contract No. WRO-06-90, WRO-03-91

RICHLIN SECURITY SERVICES CO.,
Appellant

v.

UNITED STATES DEPARTMENT OF JUSTICE,
Respondent

Gilbert J. Ginsberg, Esq., Washington, D.C.,
Counsel for the Appellant

Reginald T. Blades, Esq., Washington, D.C.,
Counsel for the Government

OPINION BY ADMINISTRATIVE JUDGE
FENNESSY ON RICHLIN'S APPLICATION
FOR ATTORNEY FEES AND EXPENSES

Richlin Security Services, Inc., submitted a timely application for attorney fees and expenses in the amount of $172,642.60 pursuant to the Equal Access to Justice Act. 5 U.S.C. § 504. Richlin subsequently amended its application reducing the amount claimed to $134,823.34.

I. Background

The underlying adversary adjudication has been the

subject of numerous opinions by this Board and the United States Court of Appeals for the Federal Circuit. Therefore, the following background is provided to place the present application in context.

The contracts in dispute were between Richlin and the Immigration and Naturalization Service (INS) for guard services. Richlin submitted a $1,568,477.12 certified claim for increased costs associated with the parties' misclassification of Richlin's employees as Guard I rather than Guard II, which commanded a higher rate of pay. In our entitlement decision we granted the appeal in part and denied it in part. We held that reformation of the contract price was appropriate because of the parties' mistake. However, we also held that, to prevent bestowing a windfall upon Richlin, the reformation could not be completed until Richlin had liquidated and satisfied its liability for the unpaid wages. The denial was "without prejudice to make further claim at such time as Richlin's liability for back wages becomes liquidated and satisfied." *Richlin Security Services Co.*, 98-1 BCA ¶ 29,651 (DOTBCA 1997) *(Richlin I)*. Throughout this proceeding Richlin appeared before the Board *pro se*.

The Government appealed that decision and the Court of Appeals affirmed it on May 7, 1998. *Messiner v. Richlin Security Services Co.*, 155 F.3d 566 (Fed. Cir. 1998) *(Richlin II)*.

While the appeal of *Richlin I* was still pending, in March 1998, Richlin wrote to the Board requesting completion of the reformation. The Government opposed the request. After the Court affirmed *Richlin I*, Richlin again wrote to the Board requesting the Board to issue an award in the amount of $1,568,477.12. The Government again opposed the request. The Board denied the request by letter dated June 17, 1998, because the original entitlement decision required Richlin to liquidate

and satisfy its obligations by paying the wages to its former employees and to submit a new claim to the contracting officer for the amount paid.

Richlin then engaged Gilbert J. Ginsberg, Esq., who negotiated a contract with DOL establishing $636,818.72 as the amount due Richlin's employees, providing for the distribution of the funds by DOL or Mr. Ginsberg, and stating that the contract "liquidated and satisfied" Richlin's obligations to its employees. On September 22, 1998, a DOL wage specialist, Richlin's president, Ms. Linda Santos, and Mr. Ginsberg executed the contract.

On October 6, 1998, Mr. Ginsberg entered his appearance before the Board and on October 26 he submitted a request to complete the reformation based upon the Richlin/DOL agreement. The Government opposed the request upon the grounds that the Court of Appeals decision was final and did not order a remand to the Board for completion of the reformation. Therefore, the Government argued that the Board lacked jurisdiction to complete the reformation.

We denied Richlin's request finding that the entitlement decision required Richlin to liquidate and satisfy its obligations and submit a new claim to the contracting officer once the amount of the obligations was determined. We also found that the Richlin/DOL agreement did not "liquidate and satisfy" Richlin's wage obligations. *Richlin Security Services Co.*, 99-1 BCA ¶ 30,219 (DOTBCA 1999) *(Richlin III)*. Richlin moved for reconsideration and we denied the motion. *Richlin Security Services Co.* 99-2 BCA ¶ 30,562 (DOTBCA 1999) *(Richlin IV)*.

Richlin appealed that decision and placed evidence before the Court that Richlin could not afford to pay its former employees without first obtaining the funds from the INS. Based upon that evidence and the Richlin/DOL contract, the Court reversed and remanded the matter to the Board finding

that the Richlin/DOL contract did liquidate and satisfy Richlin's obligations and that the Board had the responsibility to direct the completion of the reformation. *Richlin Security Services Co. v. Rooney*, 18 Fed. Appx. 843 (Fed. Cir. 2001) *(Richlin V)*. We do not know whether the Government raised the jurisdictional issue mentioned in its opposition to Richlin's request for completion of the reformation because the Court did not address that issue. However, the Court's decision and remand reflect a belief that we did in fact possess jurisdiction to complete the reformation.

On remand, Richlin posited alternative methods for computing its claim of approximately $1.5 million, inclusive of the $636,818.72 in wages. Because Richlin wished to distribute the unpaid wages immediately, it asked the Board to make an interim award of $636,818.72, the gross amount due Richlin's former employees pursuant to the agreement with DOL. The Board granted the request. *Richlin Security Services Co.*, 02-2 BCA ¶ 31,876 (DOTBCA 2002) *(Richlin VI)*. Thereafter, the Board issued a decision finding that, in addition to the gross wages, an award would be made for payroll taxes and workmen's compensation premiums in the amount for which Richlin may be liable once the unpaid wages were distributed. We denied all other elements of the claim. However, we were unable to make the award until Richlin established the actual amount of payroll taxes and insurance for which it was liable. *Richlin Security Services, Inc.* 03-2 BCA ¶ 32,302 (DOTBCA 2002). *(Richlin VII)*.

Richlin appealed that decision. While the appeal was pending Richlin submitted its EAJA application on May 23, 2003. We discuss the procedural history of the EAJA application below.

The Court of Appeals affirmed *Richlin VII*. *Richlin Security Services* v. *Ridge*, 2004 WL 1153349 (Fed. Cir. May

14, 2004). *(Richlin VIII).*

In the meantime the wages were distributed and the parties submitted additional briefs on the remaining quantum issues. The Board issued an opinion awarding the payroll taxes Richlin owed[1] and denying Contract Disputes Act interest. *Richlin Security Services, Inc.*, 2004 WL 1638067 (DOTBCA 2004). *(Richlin IX).*[2]

II. The EAJA Application

The Board received Richlin's application on May 23, 2003, following our decision in *Richlin VII.* We stayed the application pending the Court's decision of the appeal of *Richlin* VII. Richlin twice supplemented the application and submitted corrections to the second supplement. The Government answered the application and Richlin then moved to withdraw it without prejudice to filing it in the Court of Appeals. We granted the motion, in part, dismissing the fees and expenses incurred in connection with the Court of Appeals action. Otherwise we denied the motion. *Richlin Security Services, Inc.*, 04-2 BCA ¶ 32,789 (DOTBCA 2004). Thereafter, Richlin submitted an amended application.

A. Motion to Strike

Richlin submitted with the amended application an affidavit from Ms. Linda Santos expressing her opinions of the Department of Justice (DOJ) attorneys who represented the Government and an affidavit from Mr. Ginsberg describing his activities with the Department of Labor to secure and execute

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[1] Richlin was not required to pay workmen's compensation premiums on the distributed wages.

[2] We understand that Richlin has appealed that decision (*Richlin IX*) to the Court of Appeals.

the Richlin-DOL agreement, addressing the Government's position on settlement, and berating the Board's docketing system.

The Government has moved to strike these affidavits upon the ground that Richlin relied upon them as evidence. The Government has noted that both the EAJA and the Board's rules require that EAJA awards be made on the basis of the administrative record. 5 U.S.C. § 504 (a) (1); Board EAJA Rule No. 14 (a).

The motion to strike the affidavits is granted. They address matters not before this Board, do not constitute a part of the administrative record, and are irrelevant to the EAJA application.

B. Eligibility

Pursuant to the EAJA, an eligible party who prevails against the United States in an adversary adjudication is entitled to recover attorney fees and expenses if the position of the Government was not substantially justified. To be eligible for an EAJA award, an applicant must establish that she is a "party" as defined in the statute by being (1) an individual whose net worth did not exceed $2,000,000 at the time the civil action was filed, or (2) an owner of an unincorporated business or a partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the civil action was filed, and which had not more than 500 employees at the time the civil action was filed. *Fields v. U.S.*, 64 F.3d 676 (Fed. Cir. 1995). Richlin has established that it meets the size and net worth requirements for an EAJA award and the Government does not dispute that Richlin was a prevailing party.

C. Substantial Justification

The Government contends that its position was

substantially justified and that Richlin therefore is not entitled to an award of fees and expenses. The Government's position is considered to be substantially justified for the purpose of denying an EAJA award if the position had a reasonable basis in law and fact. *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). Thus, the Government must be justified to a degree that would satisfy a reasonable person. *Id.* The Government bears the burden of proving that its position was substantially justified. *Heifer v. West*, 174 F.3d 1332, 1336 (Fed. Cir. 1999); *Community Heating & Plumbing Co., Inc. v. Garrett*, 2 F.3d 1143, 1145 (Fed. Cir. 1993).

While the Government's position on different issues may be more or less justified, "the EAJA – like other fee shifting statutes – favors treating a case as an inclusive whole rather than as atomized line-items." *Comm'r v. Jean*, 496 U.S. 154, 161-62 (1990). Whether the Government's position is substantially justified requires a "single finding" that "operates as a one-time threshold for fee eligibility." *Id.* at 160.

In this case, the Government, relying upon *Collins International Service Company v. United States*, 744 F.2d 812 (Fed. Cir. 1984), denied Richlin's claim and defended the appeals upon the ground that Richlin bore the risk of misclassifying its employees.

In *Collins*, the DOL wage determination listed positions that bore only a loose correlation to the work required by the solicitation. The Court found that the contractor bore the risk of misclassifying its employees because the contract provided that Collins was required to classify employees not listed in the wage determination so as to provide a "reasonable relationship" to the wages listed in the DOL determination.

The Government's reliance upon Collins was misplaced because the facts of Richlin's case are inapposite to those in *Collins*. In an attempt to fit Richlin within the scope of Collins,

the Government identified a contract provision which stated:

> This procurement is subject to the requirements of the Service Contract Act of 1965, as amended. Any questions regarding the extent of the obligation of the Contractor under the Act should be addressed to the U. S. Department of Labor.

According to the Government, this provision squarely placed the risk of misclassifying employees upon Richlin. However, that provision did not control these appeals because there was no evidence that Richlin had any questions regarding its Service Contract Act obligations. Rather, another provision in which the Government expressly stated that the contracts required Guard I services placed the risk of misclassification upon the Government.

Because the Government had asserted that the contract required Guard I services and because Richlin's bid price was clearly based upon Guard I wages rather than Guard II wages, we found a mutual mistake of fact warranting reformation of the contract price. Given the distinguishing facts in *Richlin*, the Government was not substantially justified in denying Richlin's claim.

III. Quantum

A. Fees Incurred Prior to Mr. Ginsburg's Notice of Appearance

The appeal was commenced on August 30, 1996. Our decision on entitlement was issued on March 20, 1997. Richlin achieved 100% success in the entitlement phase of this litigation. However, no counsel made an appearance on Richlin's behalf in the appeals during that phase of the proceeding. Consequently, Richlin is not entitled to fees and expenses for the entitlement phase of the litigation when it appeared *pro se* before the Board. *Naekel v. Department of*

Transportation, 845 F.2d 976, 981 (Fed.Cir. 1988).

Nevertheless, in the original application Richlin included $8,691.09 in attorney fees and $919.58 in expenses incurred by Epstein, Becker & Green from August 1994 through August 1996, prior to Mr. Ginsburg's appearance. In the amended application, Richlin has removed all but a limited amount of the fees incurred prior to Mr. Ginsburg's appearance on October 6, 1998. Richlin now seeks fees and expenses incurred by Mr. Ginsburg beginning June 24, 1998, before he entered his appearance but after the Court of Appeals had affirmed our entitlement decision. Richlin seeks fees for 18.55 hours of attorney time for work performed between June 24 and October 6, 1998. The question is whether Richlin may recover those fees.

Our authority to award fees and expenses is governed by 5 U.S.C. § 504(a)(l), which provides that:

> An agency that conducts an adversary adjudication shall award to a prevailing party other than the United States fees and other expenses incurred by that party in connection with that proceeding . . .

Id. Section 504 (b)(l)(c) defines an adversary adjudication as, among other things, "any appeal of a decision made pursuant to section 6 of the Contract Disputes Act of 1978 (41 U.S.C.§ 605) before an agency board of contract appeals . . ."

The Government contends that Richlin is not entitled to any fees incurred outside of the adversary adjudication. In support of its position the Government relies upon *Naekel v. Department of Transportation, supra.* There the Court held that the EAJA did not authorize an award of attorney fees for the time a party acted *pro se*. While we agree that a party may not recover fees when acting *pro se*, we believe that the fees claimed in this instance, while incurred prior to Mr. Ginsberg's

appearance, are within our EAJA authority to award fees incurred in connection with an adversary adjudication.

We are guided by the decision of the Court of Appeals in *Levernier Construction, Inc. v. United States*, 947 F.2d 497 (Fed. Cir 1991). *Levernier Construction* involved an EAJA claim for consultant costs incurred to prepare a claim to the contracting officer. The Claims Court allowed the costs even though they had been incurred before the action in that court had been commenced. The Court of Appeals reversed focusing on the language of 28 U.S.C. § 2412(d)(l)(A), the judicial counterpart to our EAJA authority.

Section 2412(d)(l)(E) authorizes the award of fees incurred "in any civil action" including an appeal by a party, other than the United States, from a contracting officer's decision pursuant to a contract disputes clause or the Contract Disputes Act. 41 U.S.C § 601 *et. seq.* Section 2412(d)(l)(A) provides that a civil action includes proceedings for judicial review of agency action. The Court in *Levernier Construction* construed those provisions to mean that "at its earliest, EAJA coverage may begin after the decision of and in pursuit of an appeal from the decision of the contracting officer." *Levernier Construction, Inc. v. United States* at 502. Further, the Court, construing the EAJA narrowly, recognized that "fees incurred for legal and factual research preparatory to Claims Court litigation" are allowable. *Id.* at 501, *citing Cox Construction Co. v. United States*, 19 Cl. Ct. 29, 33-34, n. 2 (1989).

Applying this reasoning to the case before us, the EAJA provisions applicable to Board proceedings permits award of fees and expenses incurred "in connection with" an adversary adjudication. 5 U.S.C § 504(a)(l). The fees claimed for the work performed by Mr. Ginsberg prior to his appearance were incurred in pursuit of the quantum phase of Richlin's appeal from the contracting officer's decision. The billing records

reflect that, from June 24 to October 6, 1998, the fees claimed were for time spent by Mr. Ginsberg for familiarizing himself with the case and negotiating the Richlin/DOL contract in an attempt to liquidate and satisfy Richlin's Service Contract Act obligations. Three weeks after Mr. Ginsberg's appearance, Richlin, by counsel, again asked the Board to complete the reformation according to the Richlin/DOL contract. Thus, the fees were incurred "in connection with" the Board proceeding and are recoverable.

B. Fees Incurred to Manage the Escrow Account

The Richlin/DOL contract was executed on September 22, 1998. Therefore, with the exception of status reports to the Board, fees and expenses incurred thereafter in connection with that agreement were incurred to implement it by distributing wages and managing the escrow account. Richlin contends that it is entitled to attorney fees for that work because the Court remanded the matter to the Board "for completion of the reformation by the procedure established in Richlin's contract with the DOL with payment advanced by INS to the escrow account." *Richlin Security Service Company v. Rooney*, 18 Fed. Appx. 843 (Fed. Cir. 2001) (unpublished).

The Government argues that Richlin is not entitled to fees for managing the escrow account and disbursing the wages and related taxes. The basis for the argument is that, in our quantum decision, we denied the fee claimed by Richlin for work performed by Richlin's president, Mrs. Linda Santos, and two employees to locate former employees, and for work performed by Mr. Ginsburg for administering the escrow account.[3] The Court of Appeals affirmed stating: "On this

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[3] *Richlin Security Services Co.*, 04-2 BCA ¶ 32,670 (DOTBCA 2004)

record we see no reason to burden the government with the costs of escrow services provided by Richlin's counsel." *Richlin Security Services v. Ridge*, 99 Fed. Appx. 906 (Fed. Cir. 2004) (unpublished).

The Court of Appeals has stated that:

> . . . Expenses of an attorney that are not incurred or expended *solely* or *exclusively* in connection with the case before the court or which expenses the court finds to be unreasonable or unnecessary in the pending litigation cannot be awarded under the EAJA.

Oliveire v. United States, 827 F.2d 735, 744 (Fed. Cir. 1987) (emphasis added).

The Court's remand instruction does not render the INS liable for attorney fees incurred by Mr. Ginsburg to perform the Richlin/DOL contract. That agreement was voluntarily entered into by Richlin, Mr. Ginsburg, and DOL. The INS was not a party to the agreement. The agreement provided in pertinent part:

> The parties agree that payment from the Immigration and Naturalization Service (INS) or from the Judgment fund will be sent directly to professor Ginsburg, as Escrow Agent, for deposit into professor Ginsburg's escrow account. Professor Ginsburg will then issue checks to each employee in the amount set forth in Attachment 1 before any other funds are disbursed. . . . *At the option of DOL, Professor Ginsburg, as Escrow Agent, will pay directly to DOL the full amount due the employees* . . . .

Richlin Security Services Co., 03-2 BCA ¶ 32,301 (DOTBCA 2002) at 159,818 (emphasis added). Thus, the Richlin/DOL contract left it to DOL to decide whether Mr. Ginsburg or DOL would disburse the funds to the employees.

There is no provision in the contract between Richlin and the INS for the arrangement between DOL, Richlin and Mr. Ginsburg. Nor are we aware of any regulatory or statutory provision delegating DOL's enforcement obligations of the Service Contract Act to a non-Government entity. The applicable regulations make DOL responsible for the enforcement of that Act. Specifically, the regulation provides:

> So much of the accrued payments due either on the contract or on any other contract . . . between the same contractor and the Government may be withheld in a deposit fund as is necessary to pay the employees . . . The Act further provides that on order of the Secretary (or authorized representatives) any compensation which the head of the Federal agency or the Secretary has found to be due shall be paid directly to the underpaid employees from any accrued payments withheld. *In order to effectuate the efficient administration of this provision of the Act, such withheld funds shall be transferred to the Department of Labor for disbursement to the underpaid employees* . . . .

29 C.F.R. § 4.187 (emphasis added).

Pursuant to this regulatory scheme, the funds DOL found to be due Richlin's underpaid employees were to have been transferred from the INS to DOL for distribution to the employees. Thus, there was no requirement for Richlin to incur any attorney fees in order for its Service Contract Act obligations to be enforced. The distribution of wages and the administration of the escrow account by Mr. Ginsburg was an undertaking unnecessary to and beyond the scope of the Board's proceedings. Therefore, we deny attorney fees and expenses incurred for that work.

C. Fees Incurred In Connection With Tax Lien

The Government argues that Richlin is not entitled to fees incurred for representing Richlin before the IRS to remove a tax lien imposed because of Richlin's belated payment of payroll taxes. In our quantum decision, we denied the tax penalty as an element of the reformed price because Richlin would not have incurred it had it not sought a partial award of the wages and distributed them prior to completion of the quantum phase of the litigation. The Court of Appeals affirmed. *Richlin Security Services v. Ridge*, 99 Fed. Appx. 906 (Fed. Cir. 2004). Mr. Ginsburg's representation of Richlin in connection with the tax lien was, like the administration of the escrow account, unnecessary to and beyond the scope of the Board's proceeding. The fees and expenses incurred in the performance of that work were not incurred solely and exclusively in connection with the Board's proceeding. *Oliveire v. United States*, 827 F.2d at 744. Therefore, we deny EAJA fees incurred in relation to the tax lien.

D. Fees In Excess of the Statutory Limitation

Pursuant to the EAJA, attorney fees are limited to $125 absent an agency regulation authorizing a cost of living adjustment. 5 U.S.C. § 504(b)(l)(A). In both its original application and in its amended application, Richlin added a cost of living adjustment to the statutory limit. The Government has consistently opposed the cost of living adjustment noting that there is no applicable regulation authorizing such an adjustment. In its reply to the Government's answer to Richlin's amended application, Richlin finally acknowledged that the Government's position was correct and again amended the amended application to eliminate $6,745.70 for the claimed cost of living adjustment. Richlin is not entitled to a cost of living adjustment and is limited to attorney fees at the statutory rate of $125.

E. Paralegal Expenses

Richlin seeks paralegal expenses for 523.80 hours performed in pursuit of the underlying appeals for a total of $45,785.10. Mr. Ginsburg's billing rates for paralegal work were $50.00 per hour, 80.00 per hour, $95 per hour and $135.00 per hour at various times during the 7 years of his representation of Richlin. We are uncertain how Richlin calculated the sum claimed for paralegal expenses because it did not provide us with that computation. It appears that it used an average billing rate to calculate the paralegal expenses.

In response to the Government's answer to the amended application, Richlin claims to have reduced to $95 the amount claimed for paralegal expenses in excess of $95 per hour. Therefore, Richlin reduced its claim for paralegal fees by $644.00. There is no evidence that Richlin reduced the amount claimed when its billing rate was less than $95.

No where in its application or amended application did Richlin identify the cost to Mr. Ginsburg's firm of the paralegal services.

The EAJA does not address the basis on which an award for paralegal expenses is to be made. While some boards of contract appeals have allowed recovery of paralegal expenses at the rate billed to the client, we have found that, pursuant to EAJA, paralegal expenses are recoverable at the cost to the firm rather than at the billed rate. *Golden West Environmental Services*, 05-1 BCA ¶ 32,869 (DOTBCA 2005); *accord* Hassling Construction Company, Inc., 03-2 BCA 32,325 (PSBCA 2003); *Valenzuela Engineering, Inc.*, 01-2 BCA ¶ 31,477 (ASBCA 2001); *Walks Construction*, 95-2 BCA ¶ 27,889 (ASBCA 1995) at 139,135-36; *Francis Paine Logging*, 92-3 BCA ¶ 25,043 (AGBCA *1992); Akcon, Inc.*, 91-3 BCA ¶ 24,147 (ENGBCA 1991); *Gracon Corp.*, 90-1 BCA ¶ 22,550 (IBCA 1990); *Ashton v. Pierce*, 580 F. Supp. 440, 443 (D. D.C.

1984).

The EAJA provides:

> (A) "Fees and expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the agency to be necessary to the preparation of a party's case, and reasonable attorney or agent fees. (The amount of fees awarded under this section shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert services paid by the agency involved and (ii) attorney or agent fees shall not be awarded in excess of $125 unless the agency determines by regulation that an increase in the cost of living or a special factor . . . justifies a higher fee.).

5 U.S.C. § 504(b) (1). From the parenthetical in the foregoing it is evident that the requirement that fees be based upon the prevailing market rate pertains to expert witness expenses, attorney and agent fees rather than paralegal fees. This interpretation is supported by the legislative history of the EAJA.

The House Judiciary Committee Report on the Senate bill, S.265, from which the EAJA was derived, explained that "[a]n 'agent fee' may be awarded for the services of a non-attorney where an agency permits such agents to represent parties who come before it" H.R.Rep. No. 1418, 96th Cong., 2d Sess. 14, *reprinted in* 1980 U.S.C.C.A.N. 4984, 4993. Congress thus identified "agent fees" as fees for representation by an authorized nonlawyer. Implicitly, then, Congress understood "attorney fees" to mean fees for representation by persons who are qualified generally to appear as a legal representative in

administrative or judicial proceedings, presumably by virtue of their formal training and licensure to practice of law.

A basic principle of statutory interpretation is that undefined terms have their ordinarily understood meaning. *Jones v. Brown*, 41 F.3d 634, 638 (Fed.Cir.1994); *Best Power Technology Sales Corp. v. Austin*, 984 F.2d 1172, 1177 (Fed.Cir.1993). The ordinary meaning of the term "attorney" is consistent with our interpretation of the EAJA.

Black's Law Dictionary states that "[i]n its most common usage . . ., unless a contrary meaning is clearly intended, [attorney] means 'attorney at law', 'lawyer' or 'counselor at law'." Black's Law Dictionary 128 (6th ed.1990). An "attorney at law" is a "[p]erson admitted to practice law in his respective state and authorized to perform both civil and criminal legal functions for clients . . ." *Id.* There is no indication that Congress intended "attorney" to be defined, for the purpose of the EAJA, other than as "attorney at law," i.e., someone formally trained and licensed in the general practice of law. *Cook v. Brown*, 68 F.3d 447 (Fed. Cir. 1995).

Paralegal employees are neither expert witness, attorneys, nor agents. Rather, paralegal services are akin to the study, analysis, or project referenced in the Act as among the expenses which may be reasonably necessary for the preparation of a party's case. The Act expressly states that these services are to be reimbursed at cost. As stated in *Walsky supra*,

> . . . the United States Senate found it necessary to clarify the meaning of "fees and expenses" because of inconsistent judicial interpretation. Insofar as pertinent, the Senate report provided as follows: 'Examples of the types of expenses that should ordinarily be compensable include paralegal time (billed at cost) . . . Senate Report No. 98-586, 98th Congress, 2d Session, at 14 (August 8, 1984).

Walsky Construction, 95-2 BCA ¶ 27,889 (ASBCA 1995) at 139, 135-36.

We recognize that some courts have awarded paralegal expenses at the rate billed to the client pursuant to other fee shifting statutes under the rationale that paralegal work would otherwise be performed by an attorney at a higher rate. Even though the fee shifting statutes did not expressly include paralegal expenses, they were considered subsumed in the provision for attorney fees. *Missouri v. Jenkins*, 491 U.S. 274 (1989); *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83 (1991); *Miller v. Adamo*, 983 F.2d 856 (8th Cir. 1993). Because statutes other than the EAJA were involved in those cases, the legislative history of the EAJA was not at issue. In *Jean v. Nelson*, 863 F.2d 759 (11th Cir. 1988) *aff'd sub. nom. Commissioner v. Jean*, 496 U.S. 154 (1990), which involved the application of the EAJA, the Government argued that the paralegal expense should be reimbursed at cost. However, the court awarded paralegal expenses at the rate billed to the client relying upon dictum from a civil rights case. The court did not address the legislative history of EAJA.

Lacking information concerning the cost to the firm, we are left with the option of denying paralegal expenses entirely, e.g. *Keno & Sons Construction Co.*, 99-1 BCA ¶ 30,273 (ENGBCA 1999), *H. E. Johnson Co. Inc.*, 99-1 BCA ¶ 30,264 (ASBCA 1999), or assigning what the Board believes is a reasonable cost to the firm.[4] We find that $35 per hour is a reasonable cost to the firm having taken judicial notice of

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[4] Even if the billing rate were the appropriate measure of paralegal expenses, Richlin's mere allegation that its clients pay its paralegal billing rate fails to establish that its rate was the prevailing market rate in the area over the period of the litigation. *See, e.g. Role Models America, Inc. v. Brownlee*, 353 F.3d 962, 970 (D.C.Cir. 2004).

paralegal salaries in the Washington D.C. area as reflected on the internet.

F. Apportionment

An award of fees and expenses is not automatic upon an applicant surmounting the size, prevailing party, and substantial justification thresholds. The Supreme Court and the Federal Circuit have instructed that the amount of fees to be awarded is a matter for the Board's discretion. *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983); *Neal & Company v. United States*, 121 F.3d 683 (Fed. Cir. 1997); *Chiu*, 948 F.2d 711 (Fed. Cir. 1991). When an applicant has achieved only partial or limited success in the underlying case, it is appropriate to apportion the fee award, taking into account the degree of success obtained. *Hensley v. Echerhart* at 436. Moreover, to the extent that an applicant engaged in conduct that unduly and unreasonably protracted the final resolution of the dispute, it is appropriate to reduce the amount claimed. 5 USC § 504(a)(3).

Having determined that Richlin passes the threshold eligibility standards for an EAJA award and that the Government's position was not substantially justified, we examine whether the amount of the fees claimed is warranted. The starting point for determining the amount of a reasonable EAJA award is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. However, other considerations may warrant the upward or downward adjustment of the award depending upon the degree of success achieved. *Hensley v. Eckerhart*, 461 U.S. at 434; *Comm'r v. Jean*, 496 U.S. 154, 163 n. 10 (1990). "A reduced fee award is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole." *Hensley v. Eckerhart*, 461 U.S. at 440. In such circumstances we may attempt to identify specific hours that should be eliminated or simply reduce the EAJA award to account for the limited

success. *Id.* at 436-37. In exercising this discretion we examine whether the degree of success makes the hours expended a satisfactory basis for making a fees award. Id. at 434.

As noted above, Richlin is entitled to EAJA fees and expenses only for the quantum phase of the appeals. The purpose of the quantum phase was to complete the reformation of the contract price due to the misclassification of guards. The purpose and function of the reformation of a contract is to make it reflect the true agreement of the parties on which there was a meeting of the minds. *American President Lines, Ltd. v. United States*, 821 F.2d 1571, 1582 (Fed.Cir.1987); *Highway Products, Inc. v. United States*, 208 Ct. Cl. 926 (1976). Throughout the quantum phase, Richlin persisted in arguing for inclusion of certain elements in the reformed price without making even the slightest showing that they were necessary to fairly reform the contract price.

Richlin offered alternative methods for computing the amount of the reformation, both of which approximated the $1,500,000, of its original claim. One method was a price comparison between the disputed contracts and a follow-on contract. The other was a cost calculation. We rejected both approaches for lack of proof and found that the $636,818.70 in wages determined by DOL plus the associated payroll taxes of $64,930.72 were the only costs appropriate for inclusion in the reformed contract price. Thus, of the approximately $1,500,000 claimed under either computation, Richlin was only able to prove that $701,748 was the proper amount of the reformation.

To reach that determination, the Board found it necessary to hold multiple telephone conferences and to request multiple briefs and documentation from Richlin in order to obtain necessary information and clarification of Richlin's position. Therefore, the hours claimed for attorney fees are excessive considering the results achieved.

G. Documentation

A party seeking an EAJA award must include with its application "an itemized statement from any attorney, agent, or expert witness representing or appearing on behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed." 5 U.S.C § 504(a)(2). The party seeking the award must provide adequate documentation of the number of hours worked and the nature of the work performed. *Williams v. Alioto*, 625 F.2d 845, 849 (9th Cir.1980), *cert. denied*, 450 U.S. 1012 (1981). Counsel must conscientiously keep records and time sheets which "should identify the general subject matter of his [her] time expenditures." *Hensley*, 461 U.S. at 424. To be compensated for attorney fees, applicants must provide sufficient detail "to permit the [Board] to make an independent determination whether or not the hours claimed are justified." *National Association of Concerned Veterans v. Secretary of Defense, 675* F.2d 1319, 1327 (D.C.Cir.1982). "Only by knowing the specific task performed can the reasonableness of hours required for any individual item be judged." *Naporano Iron & Metal Company v. United States*, 825 F.2d 403, 404 (Fed. Cir. 1987).

Richlin's documentation supporting the fees claimed does not always describe the work with enough specificity to enable the Board to determine with precision whether certain billed hours were incurred solely in connection with the Board proceedings or were incurred to manage the escrow account, disburse wages, represent Richlin before the IRS on the tax lien, or to prosecute Richlin's appeals before the Court. For example, throughout the billing documents there are numerous entries for "telephone conference with Linda," or "telephone conference with Linda Santos." When these entries appear during the periods Mr. Ginsburg was managing the escrow account and distributing wages, or representing Richlin before the IRS or the

Court of Appeals, there is no basis for determining the subject matter of these conferences.

Moreover, an EAJA applicant is required to exercise billing judgment. The prevailing party must make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, and the courts and boards reviewing fee petitions must exclude hours "not reasonably expended." *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983). That is, a party should not seek from the Government fees which would not be properly billed to a client. Here there is no indication that any billing judgment has been exercised, particularly with respect to applicant's need to provide multiple additional briefs to support its position.

IV. Award

A. Attorney Fees and Expenses – The Appeals

Richlin's amended application is divided into two parts – the fees and expenses incurred in connection with underlying appeals and those incurred to prepare the EAJA application. With respect to the underlying appeals, Richlin claims attorney fees in the amount of $58,539.45. As stated above, these fees were computed using a cost of living adjustment factor causing the fees to exceed the statutory limit of $125. The amended application, as further amended by Richlin's response to the Government's answer, seeks paralegal expenses in the amount of $45,785.10, at a billing rate of $95 per hour.

After a careful review of Richlin's billing statements, we have denied or reduced the award for fees and paralegal expenses where the nature of the services charged were not properly included in the EAJA application. For example, we have denied or reduced the fee award where the work involved disbursing wages and managing the escrow account, where there are telephone conferences with individuals whose role in

the appeals before the Board is unknown, where the representation involved the tax lien imposed by the Internal Revenue Service, where the work pertained to the possibility of obtaining relief in the Court of Federal Claims by Congressional reference, where the work involved representation before the Court of Appeals[5], where the work was clerical or administrative in nature, and where we determined that the work was unnecessary or unreasonable.

Based upon the foregoing, in connection with the underlying appeals, we award $43,312.50 in legal fees and $9,394.00 in paralegal expenses at the rate of $35.00 per hour as the reasonable cost to the firm.

Applicant claims other expenses for the underlying appeals in the amount of $2,866.06. The documentation for this amount consists of monthly statements for telephone/fax; messenger service, postage, duplicating, meals, parking, taxis, computer research, filing fee,[6] outside secretarial service, postage for mailing W-4 and W-2 forms, computer programs for running W-2 forms and for printing W-2 forms and envelopes, postage for mailing checks to former employees, and Federal Express for delivering checks to former employees. Otherwise, there is no detail of how the expenses pertained to the underlying appeals.

As with fees and paralegal expenses, where the billing records reflect expenses incurred in connection with

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[5] Although the reason stated by Richlin for submitting the amended application was to remove the fees incurred in the Court of Appeals action, the documentation supporting the amended application continued to include some charges for that work.

[6] We assume that the fee pertains to the Court of Appeals action as the Board does not have a filing fee.

distributing wages and managing the escrow account, we have denied them. These expenses amount to $586.81. We also have denied the $2.00 filing fee. Those sums amount to approximately 20% of the claimed expenses. However, expenses were undoubtedly incurred in connection with telephone conferences with individuals whose role in the appeals is unknown, where the representation involved the tax lien, and where we determined that the work was unnecessary or unreasonable, such as work on additional briefing needed to put forth and clarify Richlin's position. Because of the lack of detail in the billing documents we are unable to determine with precision the amount of expenses that were reasonably incurred in connection with the appeals. Therefore, we deny an additional 30% of the amount claimed by way of a jury verdict to account for unsupported, unnecessary, and unreasonable expenses. We award $ 1,433.00 as reasonable expenses incurred in connection with prosecuting the appeals. Our denial of 50% of the claimed other expenses corresponds with our denial of 50% of the combined total of attorney fees and paralegal expenses claimed by Richlin.

B. Attorney Fees and Expenses – The EAJA Application

Richlin seeks attorney fees of $19,347.40, paralegal expenses of $7,748.00, and other expenses of $636.33 for the preparation the EAJA application. Attorney fees incurred in the preparation of an EAJA application are compensable. *Schuenemeyer v. United States*, 776 F.2d 329, 333 (Fed. Cir. 1985).

The Board received the EAJA application on May 23, 2003, within 30 days after the Government's right to appeal *Richlin VII* had expired. However, Richlin had appealed the adverse portions of *Richlin VII*. The Government moved to dismiss the application because the appeal rendered it

prematurely filed. Richlin never responded to the motion and the Board did not act on it. Rather the Board stayed proceedings pending the Court's decision.

After the Court affirmed *Richlin VII* (*Richlin VIII*), and both parties submitted written notice that they would not petition the Supreme Court for a writ of certiorari, we resumed proceedings on the EAJA application.

After Richlin twice supplemented its EAJA application, and submitted errata to the supplement, the Government answered the application. Richlin then moved to withdraw the application without prejudice to filing it in the Court of Appeals. The basis for that motion, taken from the Government's answer, was that Richlin had incorrectly included in its application fees and expenses incurred in connection with an appeal to the Court. We granted the motion in part, dismissing the fees and expenses incurred in connection with the Court of Appeals action. Otherwise we denied the motion. *Richlin Security Services, Inc.*, 04-2 BCA ¶ 32,789 (DOTBCA 2004).

The Board, planning to deduct incorrectly included fees based upon Richlin's supporting documentation, did not direct the submission of a corrected application. Nevertheless, appellant requested time to amend its application. On January 14, 2005, Richlin submitted the amended application. Rather than simply eliminating the improper fees and expenses, Richlin essentially submitted a new application substantially expanding its arguments. The original application was 9 pages while the amended application was 21 pages. In addition to excluding most charges incurred in connection with the Court of Appeals action, Richlin also excluded fees and expenses incurred long before Mr. Ginsburg represented Richlin before the Board. Richlin provided different documentation to support the amended application. The Government answered the

application on March 29, 2005. Richlin replied on April 29, 2005, further amending its application by acknowledging that it was not entitled to a cost-of-living adjustment.

Richlin made several missteps in connection with its EAJA application. It originally claimed $8,691.09 fees and $919.58 in expenses for the law firm of Epstein, Becker & Green for the period beginning August 1994 through August 1996 despite the fact that the Board did not even receive Richlin's appeals until August 30, 1996. When Richlin filed its original application in May 2003, it was a well-established principle that a party may recover attorney fees only after the receipt of a contracting officer's decision and in pursuit of an appeal from such decision. *Levernier v. United States*, 947 F.2d 497, 502 (Fed. Cir. 1991); *Tele-Sentry Sec., Inc. v. General Services Admin.*, 93-2 BCA ¶ 25,816 (GSBCA 1993). Moreover, a party may not recover fees and expenses when appearing before the Board *pro se*. *Naekel v. Department of Transportation*, 845 F.2d 976,981 (Fed. Cir. 1988); *accord, Foremost Mechanical Systems, Inc. v. General Services Admin.*, 99-1 BCA ¶ 30,352 (GSBCA 1999); *Jay-Brant General Contractors*, 98-1 BCA ¶ 29,687, 29687, (ENGBCA 1998); *Fanning, Phillips & Molnar*, 97-2 BCA ¶ 29,008 (VABCA 1997); *Labco Const., Inc.*, 95-2 BCA 27,677 (AGBCA 1995); *Zinger Const. Co.*, 1993 WL 11586 (ASBCA 1993).

Richlin also included in its original application fees incurred in connection with its appeal to the Court. Richlin did not cite any authority for the theory that the Board possessed jurisdiction to make an EAJA award for fees and expenses incurred in a court proceeding and the EAJA does not support that theory. 5 U.S.C § 504. When Richlin submitted its original application it had long been established that administrative tribunals lacked authority to award EAJA fees and expenses incurred before the Court of Appeals for the Federal Circuit.

Phillips v. General Services Administration, 924 F.2d 1577, 1581 (Fed. Cir. 1991); *Oliveira v. United States*, 827 F.2d 735,744 (Fed. Cir. 1987); Olsen v. *Department of Commerce, Census Bureau*, 735 F.2d 558, 561 (Fed.Cir. 1984). *Herman B. Taylor v. General Services Administration*, 01-2 BCA P 31,491 (GSBCA 2001); *Hardrives Inc.*, 96-1 BCA ¶ 27.935 (IBCA 1996); *Gilroy-Sims & Associates v. General Services Administration*, GSBCA 11778-C, 93-1 BCA ¶25,547; *Sysorex Information Systems. Inc. v. Department of the Treasury*, 93-1 BCA ¶ 25,428 (GSBCA 1992) (full Board).

The Board dismissed the improperly included Court of Appeals fees and expenses at Richlin's request. Nevertheless, Richlin included some of the Court of Appeals fees and expenses in its amended application.

In both the original application and in the amended application, Richlin included a cost-of-living adjustment (COLA). However, the EAJA prohibits an administrative tribunal from awarding a cost of living adjustment absent a regulation providing for one. 5 USC § 504(b)(l)(A). This was also a well-established principle when Richlin submitted its application. *Akon, Inc.* 91-3 BCA ¶ 24,147 (ENGBCA 1991); *Patten Company*, 90-3 BCA ¶ 23,002 (ASBCA 1990); *Coastal, Inc.*, 89-2 BCA ¶ 21,876 (PSBCA 1989); *James W. Sprayberry Construction*, 89-2 BCA ¶ 21,797 (IBCA 19898); *OK'S COMPANY*, 89-2 BCA ¶ 21,751, (AGBCA 1989); *Berkley Construction Co., Inc.*, 88-3 BCA ¶ 20,941 (VABCA 1988). We are not aware of any regulation authorizing fees in excess of the statutory limit of $125. Richlin finally acknowledged this principle in its reply to the Government's answer to the amended application and again amended the application accordingly.

In light of the foregoing, and because Richlin found it expedient to submit a totally new EAJA application, we deny

all fees and expenses incurred up to October 29, 2004, the date we issued our decision on Richlin's motion to withdraw the application.

From that date forward, Richlin seeks fees for 113.8 hours of attorney work ($14,225 at $125 per hour), paralegal expenses for 68.2 hours of work ($2,387 at $35 per hour), and $164.95 in other expenses for compiling the amended application. However, Richlin's amended application still contained unnecessary errors. Further, the Board did not request an amended application and much of the work associated with the preparation of the amended application was redundant, having been addressed in the original application. Therefore, we award as a jury verdict 50% of the fees and expenses incurred after October 29, 2004. We award $7,125.50 for attorney fees, $1,199.50 for paralegal expenses, and $82.46 for other expenses as the fair and reasonable amount for the services rendered to prepare the EAJA application.

Decision

The EAJA application is granted in part. We award a total of $50,425.00 in attorney fees, $10,587.50 in paralegal expenses, and $ 1,515.46 in other expenses. Otherwise the application is denied.

Eileen P. Fennessy
Deputy Chief Administrative Judge
Vice Chairman

Concur:
James L. Stern
Chief Administrative Judge
Chairman

Jeri Kaylene Somers
Administrative Judge

Date: June 30, 2005

United States Court of Appeals for the Federal Circuit

06-1055

RICHLIN SECURITY SERVICE COMPANY,
Appellant,

v.

Michael Chertoff,
SECRETARY OF HOMELAND SECURITY,
Appellee.

DECIDED: April 3, 2007

ON PETITION FOR REHEARING.

Before RADER, Circuit Judge, PLAGER, Senior Circuit Judge, and DYK, Circuit Judge.

Opinion for the court filed by Circuit Judge DYK. Senior Judge PLAGER dissents.

DYK, Circuit Judge.

Our original panel opinion determined that the Equal Access to Justice Act ("EAJA"), 5 U.S.C. § 504, allows recovery for paralegal services as part of "expenses" and not as part of "attorney's fees," and accordingly that recovery was limited to costs and was not available at market rates. Richlin Sec. Serv. Co. v. Chertoff, 472 F.3d 1370, 1381 (Fed. Cir. 2006).

In our decision, we declined to follow the contrary decision of the Eleventh Circuit in Jean v. Nelson, 863 F.2d 759, 778 (11th Cir. 1988), aff'd on other grounds, Immigration & Naturalization Serv. v. Jean, 496 U.S. 154 (1990). In a petition for rehearing, Richlin claims for the first time that several other circuits have adopted the Jean approach and that our decision is in conflict with those circuits as well. See Role Models Am., Inc. v. Brownlee, 353 F.3d 962, 974 (D.C. Cir. 2004); Hyatt v. Barnhart, 315 F.3d 239, 255 (4th Cir. 2002); Miller v. Alamo, 983 F.2d 856, 862 (8th Cir. 1993); see also Stockton v. Shalala, 36 F.3d 49, 50 (8th Cir. 1994). While two of the decisions cite to Jean[1] and all refer to recovery of paralegal "fees," the cases appear to have involved the issue of whether payments for paralegal services were recoverable at all, and did not directly address whether they are "attorney's fees" or "expenses" under EAJA. See Role Models Am., 353 F.3d at 974 ("The government opposes any recovery for the legal assistants, arguing that a party may not recover fees for work done by non-attorneys."); Hyatt, 315 F.3d at 255 ("Although fees for paralegal time may be recoverable under the EAJA, such fees are only recoverable to the extent they reflect tasks traditionally performed by an attorney and for which the attorney would customarily charge the client."); Miller, 983 F.2d at 862 ("Work done by paralegals is compensable if it is work that would have been done by an attorney.").

In any event, we see nothing in those cases to alter our conclusion that payments for paralegal services under EAJA are not recoverable as "attorney's fees" but are recoverable as

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[1] See Hyatt, 315 F.3d at 255; Miller, 983 F.2d at 862.

"expenses," allowable only at cost.[2]

The petition for rehearing is denied.

Senior Judge PLAGER dissents on the basis of his dissent from the original panel opinion.

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[2] Richlin also points out for the first time that the legislative history cited in our original opinion at 472 F.3d at 1381, see S. Rep. No. 98-586, 98th Cong., 2d Sess., at 15 (Aug. 8, 1984), did not relate directly to the EAJA amendment adopted in 1985. The cited legislative history related to a version of EAJA that was enacted by Congress in 1984 but that was vetoed by President Reagan primarily because the president objected to the bill's definition of "position of the United States." See H.R. Rep. 99-120, pt. 1, at 6 (1985), reprinted in 1985 U.S.C.C.A.N. 132, 134. Congress enacted a new version in 1985, which clarified the "position of the United States" definition. See Pub. L. 99-80 (Aug. 6, 1985). Otherwise, the 1985 legislation was nearly identical to the bill passed by Congress in 1984, and the earlier legislative history is therefore pertinent to the 1985 enactment on the issue presented here.

NOTE: This order is nonprecedential.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ORDER

A petition for rehearing en banc having been filed by the Appellant, and a response thereto having been invited by the court and filed by the Appellee, and the matter having first been referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on April 10, 2007.

FOR THE COURT,
/s Jan Horbaly
Clerk

Dated: 04/03/2007

cc: Brian Wolfman
Reginald T. Blades, Jr.

RICHLIN SECURITY SERVICE V DHS, 2006-1055
(BCA - 3034, 3035)

FILED April 3, 2007

(3)

No. 06-1717

In the Supreme Court of the United States

RICHLIN SECURITY SERVICE COMPANY,
PETITIONER

v.

MICHAEL CHERTOFF, SECRETARY OF
HOMELAND SECURITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether, under the Equal Access to Justice Act, 5 U.S.C. 504 and 28 U.S.C. 2412, paralegal services are "attorney fees" compensable at market rates, or "other expenses" compensable at the rate of cost to the attorney.

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In the Supreme Court of the United States

No. 06-1717

RICHLIN SECURITY SERVICE COMPANY,
PETITIONER

v.

MICHAEL CHERTOFF, SECRETARY OF
HOMELAND SECURITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 472 F.3d 1370. The supplemental opinion of the court of appeals denying rehearing (Pet. App. 54a-56a) is reported at 482 F.3d 1358. The decision of the Department of Transportation Board of Contract Appeals (Pet. App. 25a-53a) is reported at 05-2 B.C.A. (CCH) ¶ 33,021.

JURISDICTION

The judgment of the court of appeals was entered on December 26, 2006. A petition for rehearing was denied on April 3, 2007 (Pet. App. 54a-56a). The petition for a

writ of certiorari was filed on June 25, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner contracted with the Immigration and Naturalization Service to provide guard services for detainees at the Los Angeles International Airport. Years later the Department of Labor (DOL) determined that the contracts had misclassified petitioner's employees for purposes of the wage classification scheme of the Service Contract Act of 1965, 41 U.S.C. 351 *et seq.*, resulting in underpayment of petitioner's employees. The DOL further found that employees were entitled to back wages from petitioner. Pet. App. 2a-3a. Petitioner then filed a claim against the government for the increased costs associated with the parties' misclassification of petitioner's employees. After a series of appeals to the Department of Transportation Board of Contract Appeals and to the Federal Circuit, the Board awarded petitioner the amount of additional wages, payroll taxes, and workers compensation premiums that petitioner was required to pay. The court of appeals affirmed. *Ibid.*

2. Petitioner thereafter applied to the Board for attorney's fees, expenses, and costs under the Equal Access to Justice Act (EAJA), 5 U.S.C. 504. Pet. App. 3a. EAJA authorizes an agency to award "fees and other expenses" to a "prevailing party" in adversary administrative proceedings in cases in which the position of the United States is not "substantially justified." 5 U.S.C. 504(a)(1).[1] The statute defines "fees and other ex-

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[1] A separate provision of EAJA provides for recovery of "fees and other expenses" from the United States by a prevailing party in a court proceeding. 28 U.S.C. 2412(d)(1)(A); see also 28 U.S.C. 2412(d)(2)(A) (defining "fees and other expenses").

penses" to include: "the reasonable cost of any study, analysis, engineering report, test, or project which is found by the agency to be necessary for the preparation of the party's case, and reasonable attorney or agent fees." 5 U.S.C. 504(b)(1). The statute further instructs that:

> [t]he amount of fees awarded under this section shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the agency involved, and (ii) attorney or agent fees shall not be awarded in excess of $125 per hour unless the agency determines by regulation that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents for the proceedings involved, justifies a higher fee.[]

5 U.S.C. 504(b)(1)(A).

In its EAJA application, petitioner sought reimbursement for $51,793.75 in attorney's fees for work on the underlying cases and $14,225 in attorney's fees for time spent preparing the EAJA application. Pet. App. 5a. It also sought reimbursement for paralegal services used by petitioner's attorney. Over the course of his representation, the attorney had billed petitioner for paralegal time at rates ranging from $50 to $135 per hour. *Id.* at 3a-4a. Petitioner's EAJA application sought reimbursement, generally at these rates,[2] for 523.8 hours of paralegal work on the underlying cases

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[2] As the court of appeals noted, petitioner appeared to limit the fee request to $95 per hour for paralegal services after June 1, 2004, when the paralegal billing rate had increased to $135 per hour. Pet. App. 5a.

and 68.2 hours of paralegal work preparing the EAJA application, totaling $51,901.10 in paralegal services. *Id.* at 5a.

3. The Board awarded petitioner $43,312.50 in attorney's fees for the underlying cases and $7125.50 in fees for the preparation of the EAJA petition. Pet. App. 47a, 52a. With regard to reimbursement for paralegal fees, the Board ruled that, under EAJA, paralegal services are recoverable at the cost to the firm, not at the rate billed to the client. Finding no evidence in the record concerning the cost of paralegal services to the firm, and unwilling to deny paralegal expenses entirely, the Board took judicial notice of paralegal salaries in the Washington, D.C. area and found that $35 per hour was a reasonable cost to the firm. *Id.* at 42a-43a. The Board accordingly awarded petitioner $10,587.50 for paralegal services. *Id.* at 52a.

4. The court of appeals affirmed. Pet. App. 1a-19a. Relying on the text, structure, purpose, and history of EAJA, the court of appeals ruled that paralegal costs are not recoverable as "fees," but rather constitute "expenses" recoverable at the cost to the attorney. *Id.* at 7a-19a.

In particular, the court explained that EAJA allows for the recovery of "expenses" as well as "fees." Given the additional category, the court determined that Congress intended paralegal costs to be recoverable as "expenses" reimbursed at cost to the attorney, and not "fees." Pet. App. 15a. That construction, the court explained, was bolstered by the fact that Congress had gone out of its way to place a cap on attorney's fees, but had not done so for paralegal costs. *Id.* at 16a-17a (citing *Arlington Cent. Sch. Dist.* v. *Murphy*, 126 S. Ct. 2455, 2461 (2006)). "The allowance of paralegal fees

without a meaningful cap would," the court explained, "create a perverse incentive" for attorneys to refer work to paralegals so that they could "recover at or near the full market rate for paralegals." *Id.* at 18a.

The court of appeals acknowledged that one court had reached a different conclusion, *Jean* v. *Nelson*, 863 F.2d 759, 778 (11th Cir. 1988), aff'd on other grounds *sub nom. Commissioner, INS* v. *Jean*, 496 U.S. 154 (1990). Pet. App. 12a. But the court declined to follow *Jean*, noting that "there was no indication that the paralegal services issue was argued" in that case. *Ibid.* The court further noted that the "short paragraph" devoted to the issue in *Jean* simply followed a previous Eleventh Circuit discussion that held paralegal services to be reimbursable under a different statute, and addressed neither the statutory text nor purpose of EAJA. *Id.* at 12a-13a.

Senior Judge Plager dissented. Pet. App. 20a-24a. He reasoned that the interpretation of EAJA should be guided by this Court's interpretation of the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. 1988, and thus concluded that paralegal services should be recoverable as "attorney's fees." Pet. App. 20a-21a (citing *Missouri* v. *Jenkins*, 491 U.S. 274 (1989)).

5. The court of appeals denied a petition for rehearing en banc. Pet. App. 57a.

ARGUMENT

The court of appeals correctly concluded that, under EAJA, an award for paralegal services is limited to the cost of services to petitioner's attorney, as opposed to market rates. That conclusion is consistent with the text, structure, purpose, and history of EAJA, as well as

with this Court's precedents. Further review is not warranted.

1. The court of appeals applied settled principles of statutory interpretation in concluding that, under EAJA, paralegal time is not reimbursable at market rates as a "fee," but is rather a litigation expense to be reimbursed at cost. As the court of appeals recognized (Pet. App. 6a-7a), EAJA "renders the United States liable for attorney's fees for which it would not otherwise be liable, and thus amounts to a partial waiver of sovereign immunity." *Ardestani* v. *INS*, 502 U.S. 129, 137 (1991). "Any such waiver must be strictly construed in favor of the United States," *ibid.*, and must not be enlarged "beyond what the language requires," *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 685-686 (1983) (citation omitted).

The language of EAJA does not require the government to reimburse paralegal costs in the same manner as attorney's fees. EAJA provides for the recovery of "fees and other expenses," but it draws a distinction between these two categories of litigation costs: Only "fees," not expenses, must be reimbursed at "prevailing market rates." 5 U.S.C. 504(b)(1)(A). As the court of appeals observed, a number of provisions of EAJA make clear that only the fees of attorneys, agents, and expert witnesses are reimbursable "fees" under the statute. Pet. App. 7a-8a (citing 5 U.S.C. 504(a)(2) and 504(b)(1)(A)). A paralegal is neither an attorney, nor an agent,[3] nor an expert witness. The plain language of the

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[3] An "agent," for purposes of 5 U.S.C. 504, is a specialized non-attorney practitioner authorized to represent clients before an administrative agency with the special permission of the tribunal. See *e.g.*, *Lane* v. *United States Dep't of Agric.*, 294 F.3d 1001, 1003 (8th Cir. 2002); *Fanning, Phillips & Molnar* v. *West*, 160 F.3d 717, 721-722

EAJA thus does not provide for market-rate recovery for paralegal services. Any argument to the contrary would enlarge the waiver of sovereign immunity beyond what the language of the statute requires.

That conclusion is bolstered by the fact that Congress specifically placed a cap on attorney's fees in EAJA, but did not place any limits on paralegal fees. See 5 U.S.C. 504(b)(1)(A); Pet. App. 16a-17a. Moreover, the cap that Congress set was plainly tied to market rates for the services of *attorneys*, not paralegals. See *id.* at 8a, 16a. As the court of appeals explained, "given that attorney's fees generally far exceed paralegal fees, it seems unlikely that Congress would have capped paralegal services at the same level as attorney's fees." *Id.* at 16a. This Court recently relied on a similar statutory anomaly in rejecting the argument that expert fees were recoverable under the attorney's fees provision of the Individuals with Disabilities Education Act. See *Arlington Cent. Sch. Dist.* v. *Murphy*, 126 S. Ct. 2455, 2461 (2006); Pet. App. 17a-18a.

As the court of appeals observed (Pet. App. 15a-16a), compensating paralegals at cost is also consistent with the central purposes of the statute. Congress enacted EAJA to encourage plaintiffs with legitimate claims to contest agency action. See *Sullivan* v. *Hudson*, 490 U.S. 877, 883 (1989). But Congress was concerned about protecting the public fisc as well as reducing economic deterrents to seeking review of government action. Thus, as the court of appeals explained, "[t]he purpose of

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(Fed. Cir. 1998); see also H.R. Rep. No. 1418, 96th Cong., 2d Sess. 14 (1980) ("An 'agent fee' may be awarded for the services of a non-attorney where an agency permits such agents to represent parties who come before it."). Petitioner did not argue that paralegal services should be reimbursed as "agent fees." Pet. App. 9a.

EAJA is not to reimburse all of the costs of the prevailing party but to reimburse costs only when the government's position was not substantially justified and even then to provide only for partial reimbursement." Pet. App. 16a. Accordingly, EAJA imposed caps on fee recovery, limiting reimbursable attorney's fees to $125 per hour. 5 U.S.C. 504(b)(1)(A). In this respect, EAJA differs from other fee-shifting provisions, including the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. 1988. See Pet. App. 15a.

Finally, the legislative history also indicates that paralegal services are not reimbursable at market rates. In an effort to clarify that unenumerated, "reasonable out-of-pocket expenses" are recoverable under the statute, the Senate Report on EAJA's reenactment stated that "[e]xamples of the type of expenses that should ordinarily be compensable include *paralegal time (billed at cost)* and the cost of duplicating copies of pleadings necessary for filing and service." S. Rep. No. 586, 98th Cong., 2d Sess. 15 (1984) (Senate Report) (emphasis added). The legislative history thus indicates that Congress did not intend to include paralegal services in the definition of "attorney fees," but rather intended that paralegal fees be reimbursed as expenses limited to the attorney's cost.[4]

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[4] Petitioner contends (Pet. 20) that any reliance on the Senate Report is misplaced because the report was prepared for a version of the EAJA that was passed by Congress but ultimately vetoed by President Reagan. As the court of appeals explained (Pet. App. 56a n.2), President Reagan vetoed the bill primarily because he objected to its definition of "position of the United States." The bill was modified to respond to the President's objection, and was otherwise largely unchanged when it passed in 1985. When the "operative language" of an unenacted bill is "substantially carried forward" into a later statute, this Court has indicated that the legislative history of the unenacted bill

2. Petitioner argues (Pet. 13-22) that the court of appeals' decision is "at odds with" this Court's decision in *Missouri* v. *Jenkins*, 491 U.S. 274 (1989). This is incorrect. In *Jenkins*, the Court interpreted the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. 1988, which authorizes courts to award prevailing parties in certain civil rights actions "a reasonable attorney's fee as part of the costs," to permit recovery for paralegal services. The Court reasoned that the phrase "reasonable attorney's fee" must "refer to a reasonable fee for the work product of an attorney" and thus must include "the work not only of attorneys, but also of secretaries, messengers, librarians, janitors, and others whose labor contributes to the work product for which an attorney bills her client; and it must also take account of other expenses and profit." *Jenkins*, 491 U.S. at 285. The Court accordingly concluded that the statute "should compensate the work of paralegals, as well as that of attorneys." *Ibid.*

In determining the appropriate rate of compensation for paralegal services, the Court ruled that a "reasonable attorney's fee" under the statute is one that is "fully compensatory," and that "is * * * calculated on the basis of rates and practices prevailing in the relevant market." *Jenkins*, 491 U.S. at 286 (internal quotation marks and citation omitted). Therefore, the Court concluded, if the prevailing practice in the relevant market is to bill separately for paralegal services, then prevailing parties are entitled under Section 1988 to recover separately for paralegal fees, at market rates. *Id.* at 286-287.

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may be pertinent to an understanding of the statute that ultimately passed. *United States* v. *Enmons*, 410 U.S. 396, 404 n.14 (1973).

As the court of appeals explained below (Pet. App. 15a-19a), *Jenkins* does not control this case. *Jenkins* concerned a different statute with different language, structure, purpose, and history. In particular, the Civil Rights Attorney's Fees Awards Act contains no provision for recovery of expenses; the Supreme Court thus concluded that Congress must have intended for the phrase "reasonable attorney's fee" to "take account" of "expenses." *Jenkins*, 491 U.S. at 285. EAJA, in contrast, specifically provides for an award of "fees *and other expenses*," and establishes that fees alone are to be reimbursed at market rates. 5 U.S.C. 504(a)(1) and (b)(1)(A) (emphasis added); see Senate Report 15 (paralegal services recoverable under the EAJA as an expense "billed at cost"). The Supreme Court's interpretation of the phrase "reasonable attorney's fees as part of the costs" in *Jenkins* therefore does not control the interpretation of the different statutory language at issue in this case.

Moreover, *Jenkins*' valuation of paralegal time rested on the premise that the Civil Rights Attorney's Fees Awards Act was designed to provide a "fully compensatory" award to prevailing parties. 491 U.S. at 287. EAJA, by contrast, is not intended to "make the prevailing party whole," and thus limits fee recovery to what are often below-market rates. See Pet. App. 16a; see *id.* at 18a. As the court of appeals recognized, *ibid.*, to import the Court's construction of Section 1988 in *Jenkins* into the EAJA context could allow attorneys effectively to evade these below-market statutory caps by shifting work to their paralegals, whose billing rates are more likely less than, or closer to, the statutory $125-per-hour maximum recovery for attorney's fees.

3. Petitioner also argues (Pet. 8-10) that the court of appeals' decision conflicts with the decisions of four other circuits. That contention does not bear scrutiny.

Contrary to petitioner's contention (Pet. 8-9), the court of appeals' decision does not conflict with *Miller* v. *Alamo*, 983 F.2d 856, 862 (8th Cir. 1993). That case involved an award under 26 U.S.C. 7430—not EAJA—and the Eighth Circuit simply distinguished certain paralegal services from other kinds of overhead expenses that are not ordinarily recoverable under fee-shifting statutes, concluding that "[w]ork done by paralegals is compensable if it is work that would have been done by an attorney." *Alamo*, 983 F.2d at 862. Moreover, although the court awarded recovery for paralegal services at a rate of $40 per hour, it said nothing about whether paralegal services were compensable as attorney's fees or as other expenses, or whether any recovery should be at market rates rather than at cost. *Ibid.*

Hyatt v. *Barnhart*, 315 F.3d 239 (4th Cir. 2002), did involve an award under EAJA, but the court did not squarely address the question presented in this case. Rather, the Fourth Circuit simply held that, "[a]lthough fees for paralegal time *may* be recoverable under the EAJA, such fees are only recoverable to the extent they reflect tasks traditionally performed by an attorney and for which the attorney would customarily charge the client." *Id.* at 255 (emphasis added). Although, as petitioner notes (Pet. 9-10), the court used the word "fees" in connection with paralegal services, the court did not consider, much less decide, whether paralegal services are compensable as "fees" within the meaning of EAJA, or whether recovery should be at market rates rather than at cost.

Nor does the decision below conflict with *Role Models America, Inc.* v. *Brownlee*, 353 F.3d 962 (D.C. Cir. 2004). Contrary to petitioner's suggestion, the *Role Models* court did not "expressly state[]" that "paralegals and law clerks are to be compensated at their market rates" under EAJA. Pet. 10 (quoting *Role Models*, 353 F.3d at 974) (emphasis omitted). Rather, the court simply rejected the Government's argument that there should be *no* recovery for work done by non-attorneys, noting that it had "previously affirmed a fee award that 'includ[ed] paralegal time.'" *Role Models*, 353 F.3d at 974 (quoting *Oklahoma Aerotronics, Inc.* v. *United States*, 943 F.2d 1344, 1352 (D.C. Cir. 1991); citing *In re Olson*, 884 F.2d 1415, 1426 (D.C. Cir. (Spec. Div.) 1989)). The "market rate" language petitioner quotes appears merely in a parenthetical following the court's citation to *Olson*. *Olson* was not, however, an EAJA case, but a case involving 28 U.S.C. 593(f)—a statute that, like the statute at issue in *Jenkins* and unlike EAJA, provides only for reimbursement of "reasonable attorneys' fees," not the recovery of expenses. And in *Oklahoma Aerotronics*, the other case cited in the District of Columbia Circuit's opinion, the court expressly categorized an EAJA award for paralegal time as an "award of *expenses*," not an award of fees. 943 F.2d at 1352 (emphasis added).

While it is true that, in its award calculations, the District of Columbia Circuit appeared to assume that paralegal time was compensable at market rates, see *Role Models*, 353 F.3d at 969-970, it did so without discussion, and without considering whether the language, structure, purpose, or history of EAJA supports that interpretation.

Petitioner is accordingly left with *Jean* v. *Nelson*, 863 F.2d 759, 778 (11th Cir. 1988). As noted above, the Federal Circuit did decline to follow the *Jean* decision, but in doing so it stressed that "there is no indication that the paralegal services issue was argued" in *Jean*, and the "*Jean* court's discussion of paralegal services was limited to a short paragraph that addressed neither the statutory language nor the purpose of EAJA." Pet. App. 12a-13a. In *Jean*, the Eleventh Circuit cited only a Title VII case, *Allen* v. *United States Steel Corp.*, 665 F.2d 689, 697 (5th Cir. Unit B 1982), for the proposition that paralegal time is recoverable as "part of a prevailing party's award for attorney's fees and expenses" to the extent that the paralegal performs work traditionally done by an attorney. The court did not, however, explain why, even if paralegal time were recoverable under EAJA, the statute requires that paralegal services be compensated at market rates rather than at cost. There is, accordingly, no considered conflict between the Federal Circuit and the Eleventh Circuit on this issue.

In any event, because only one other circuit besides the court below has addressed the question presented in this case, and because that court has given the issue only limited consideration, the issue would benefit from further ventilation in the courts of appeals.

4. Finally, petitioner contends (Pet. 11-12) that review should be granted because the Federal Circuit's decision will have a disproportionately large impact given the nature of the Federal Circuit's docket. That contention should be rejected. Although a substantial percentage of the Federal Circuit's docket does consist of cases involving the federal government, EAJA cases

are heard in significant numbers in every circuit, and the total number of administrative and other claims involving the government that are heard by the Federal Circuit represents a relatively small percentage of similar claims heard nationwide.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 2007

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[5] Compare U.S. Court of Appeals for the Federal Circuit—*Appeals Filed, Terminated, and Pending During the Twelve Month Period Ended September 30, 2006*, Table B-8 <http://www.cafc.uscourts.gov/pdf/ao0906.pdf>, and U.S. Court of Appeals for the Federal Circuit, *Adjudications by Merits Panels, by Category, FY 2006* <http://www.fedcir.gov/pdf/ChartAdjudications06.pdf>, with U.S. Court of Appeals--*Appeals Terminated on the Merits, by Circuit, During the 12-Month Period Ending March 31, 2006*, Table B-5 <http://www.uscourts.gov/caseload2006/tables/ B05Mar06.pdf>.

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No. 06-1717

IN THE
Supreme Court of the United States

RICHLIN SECURITY SERVICE COMPANY,
Petitioner,

v.

MICHAEL CHERTOFF,
SECRETARY OF HOMELAND SECURITY,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Federal Circuit

PETITIONER'S REPLY

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PETITIONER'S REPLY

The government argues that the petition should be denied because the circuit split created by the Federal Circuit's decision, while undeniable, is too shallow to warrant review. It also argues that the Federal Circuit's role in EAJA litigation is irrelevant to the petition's cert-worthiness, and that the ruling below properly construed EAJA. None of these assertions is correct, and none undermines the need for review.

A. The Circuit Split Alone Justifies Review.

1. The government grudgingly concedes that the decision below is directly at odds with the Eleventh Circuit's decision in *Jean v. Nelson*, 863 F.2d 759, 778 (11th Cir. 1988), as the Federal Circuit below repeatedly acknowledged. Pet. App. 12a-13a, 55a (on rehearing) ("In our decision, we declined to follow the contrary decision of the Eleventh Circuit in *Jean v. Nelson.*"). It then tries, in two ways, to diminish the importance of the circuit split. Neither effort succeeds.

First, the government brazenly adopts the Federal Circuit's statement that "'there is no indication that the paralegal services issue was argued' in *Jean.*" Opp. 13 (quoting Pet. App. 12a). But that statement is patently wrong. The exact opposite is plain on the face of the *Jean* opinion, which describes the contested issue as follows:

> The district court awarded reimbursement for time spent by paralegals and law clerks where the work was that normally done by an attorney. The hourly rate awarded was $40. This is the rate at which the law firm whose paralegals and clerks were involved bills its clients. The government challenges the rate awarded, *and contends that paralegal time is recompensable only at the actual cost to the plaintiffs' counsel.*

Jean, 863 F.2d at 778 (emphasis added). Thus, there is no reason to overlook the circuit split on the (manifestly incorrect) ground that the question presented in the petition was not fully

litigated before the Eleventh Circuit in *Jean*.

Second, the government says that there is "no considered conflict" on the question presented because *Jean* did not "explain why, even if paralegal time were recoverable under EAJA, the statute requires that paralegal services be compensated at market rates rather than at cost." Opp. 13. That statement is also flatly incorrect. *Jean* relied on a Title VII case from the Fifth Circuit that had awarded fees for paralegal services. It then held that '[t]he same analysis applies here . . . because excluding reimbursement for such work might encourage attorneys to handle entire cases themselves, thereby achieving the same results at a higher overall cost." *Jean*, 868 F.2d at 778. As explained in the petition (at 7-8), *Jean*'s efficiency rationale is precisely the rationale later adopted by this Court in *Missouri v. Jenkins*, 491 U.S. 274, 288 (1989) (market-rate paralegal fees "makes economic sense. By encouraging the use of lower cost paralegals rather than attorneys wherever possible, permitting market-rate billing of paralegal hours 'encourages cost-effective delivery of legal services[.]'") (quoting *Cameo Convalescent Center, Inc. v. Senn*, 738 F.2d 836, 846 (7th Cir. 1984)).

In sum, *Jean* rejected the exact argument that the Federal Circuit accepted below – that paralegal services should be compensated under EAJA at cost, not at market rates – and it did so based on the same reasoning endorsed by this Court in *Jenkins*. The government's attempts to diminish the conflict should be rejected.

2. The government is also wrong in claiming that decisions of the D.C., Fourth, and Eighth Circuit do not conflict with the Federal Circuit's ruling. The government's attempt to explain away the D.C. Circuit's decision in *Role Models America, Inc. v. Brownlee*, 353 F.3d 962 (2004), is untenable. The government says that the D.C. Circuit "appeared to assume that

paralegal time was compensable at market rates," Opp. 12, but the *Role Models* opinion shows that the court was operating on more than an assumption. The court there *actually awarded* market-rate fees for paralegal time, but reduced the requested rates by 25% because the plaintiffs had not adequately proved "*the prevailing market rate for law clerks and legal assistants* in the Washington area." 353 F.3d at 970 (emphasis added). Even more damaging to the government's position is that, immediately after noting the government's objection to fees for paralegal services, the court in *Role Models* stated that "[t]his Circuit 'holds that paralegals and law clerks are to be compensated at their *market rates*.'" 353 F.3d at 974 (quoting *In re Donovan*, 877 F.2d 982, 993 n.20 (D.C. Cir. 1989)) (emphasis added). The government's only response is that the quoted language appears "merely in a parenthetical" after a citation to a non-EAJA case. Opp. 12. But why would a court use a parenthetical as *support* for its holding, as the D.C. Circuit did in *Role Models*, if it did not think the parenthetical actually applied to the case before it? Any other interpretation of the language in *Role Models* would be spectacularly odd because, as noted, the court there did exactly what the parenthetical would demand: award fees for paralegal services at market rates.

Turning to the Fourth Circuit's decision in *Hyatt v. Barnhart*, 315 F.3d 239 (2002), the government concedes that "the court used the word 'fees' in connection with paralegal services," but claims that the court "did not consider, much less decide, whether paralegal services are compensable as 'fees' within the meaning of EAJA, or whether recovery should be at market rates rather than at cost." Opp. 11. The first point is simply wrong, while the second is a non sequitur. The very thing that *Hyatt* decided was that paralegal services, which it described as "fees," were compensable under EAJA. 315 F.3d at 255. And, to suggest that the Fourth Circuit's ruling may be

consistent with the decision below – that is, that the Fourth Circuit might have thought that EAJA "fees" are compensable at cost only – is to create a statute that does not exist. Under EAJA, "[t]he amount of fees awarded . . . shall be based upon prevailing market rates for the kind and quality of the services furnished." 5 U.S.C. § 504(b)(1)(A)(ii); 28 U.S.C. § 2412(d)(2)(A). Thus, once it is determined that an applicant is entitled to "fees," they must be awarded at market rates. In any event, any doubt about whether *Hyatt* is at odds with the Federal Circuit's decision is resolved by *Hyatt*'s principal reliance on the Eleventh Circuit's ruling in *Jean*, which held that paralegal services are compensable at market rates under EAJA. *See Hyatt*, 315 F.3d at 255.

For much the same reasons, the government fails to explain away the Eighth Circuit's decision in *Miller v. Alamo*, 983 F.2d 856, 862 (1993). It says that *Miller* was silent about whether paralegal services are "fees" or "other expenses," Opp. 11, but, as explained in the petition (at 9), *Miller* explicitly cited *Jean* and adopted its market-rate rationale, and then awarded paralegal fees "at a *rate* of $40 per hour," 983 F.2d at 862 (emphasis added), which connotes a market-rate award. *See also* Pet. 10 n.3 (explaining that *Miller* involved a market-rate award, which the government does not dispute).

3. The government's ultimate basis for resisting review is the last-ditch refrain, often heard when there is an undeniable circuit conflict: that "the issue would benefit from further ventilation in the courts of appeals." Opp. 13. That argument rings hollow here, where five circuits have weighed in on an important question of federal law. Moreover, aside from the circuit split, the government's opposition ignores two other points that underscore the petition's importance: first, that the Federal Circuit has placed itself in conflict with the virtually unanimous practice in the district and Article I courts, which have routinely awarded market-rate EAJA fees for paralegal

services, Pet. 10-11 & n.4; *see also Former Employees of BMC Software, Inc. v. U.S. Dep't of Labor*, 2007 WL 2994605, *38 (C.I.T. Oct. 15, 2007) (court subject to Federal Circuit's appellate jurisdiction explaining that "[p]rior to *Richlin*, EAJA awards had included compensation for paralegal work at market rates"), and, second, that market-rate billing for paralegal services is a nearly universal feature of modern legal practice. *Id.* at 13; *see also* Br. Amici Curiae of Nat'l Assn. of Legal Assistants, et al. ("NALA Br.") 4-7.

But even if the government were correct that the only relevant consideration was the conflict between the Eleventh Circuit's ruling in *Jean* and the Federal Circuit's ruling below, there would be no reason for "further ventilation." In holding that paralegal services are compensable under EAJA at market rates, the Eleventh Circuit expressly rejected the exact argument accepted by the Federal Circuit: that such services are compensable under EAJA only at cost, regardless of how they are billed in the marketplace. The government does not argue – nor could it plausibly argue – that the Eleventh Circuit will overrule *Jean*, which has stood as binding precedent for nearly two decades. The issue is ripe for review, and the Court should review it now.

B. The Issue Is Important, Particularly Because This Case Arises From The Federal Circuit.

The petition argues that the issue is important, among other reasons, because the decision below denying market-rate fees for paralegal services arose in the Federal Circuit, with its large docket of cases in which EAJA applies. Pet. 11-12; *see also* NALA Br. 14 (noting that Federal Circuit has "outsized role in EAJA cases."). The government says that "[a]lthough a substantial percentage of the Federal Circuit's docket does consist of cases involving the federal government, EAJA cases are heard in significant numbers in every circuit." Opp. 13-14.

That is a strange way of rebutting our point, because the presence of many EAJA cases all over the country supports, not undermines, the need for review. *See also* NALA Br. 13 & n.12 (explaining that EAJA applications "involve a wide variety of subject matters," citing cases nationwide).

In any event, we never claimed that the Federal Circuit hears more cases involving the federal government than do other circuits. What we said is that review is particularly appropriate in this case because it arose from the Federal Circuit, which hears a relatively high number of *EAJA cases* and, unlike the regional courts of appeals, has appellate jurisdiction over Article I tribunals in which EAJA applications are frequently filed. Pet. 11-12. A Westlaw analysis of recent court decisions bears out these contentions. In cases decided between January 1 and October 15, 2007, the term "Equal Access to Justice Act" has appeared 10 times in Federal Circuit cases, while in the Second and Fifth Circuits, two circuits with significant populations, the term has appeared four and two times, respectively. In addition, over the same period, the term has appeared in 80 cases decided by the Court of Appeals for Veterans Claims (one of several Article I tribunals within the Federal Circuit's purview), while it has appeared in 29 cases in all district courts within the Second and Fifth Circuits combined.[1]

In sum, that it is the Federal Circuit that has staked out a position at odds with nearly every other federal precedent heightens the petition's importance.

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[1]On average over the past four years, the Court of Appeals for Veterans Claims has granted more than 1000 EAJA applications. *See* Court of Appeals for Veterans Claims–Annual Reports, available at http://www.vetapp.uscourts.gov/documents/Annual_Reports.pdf.

C. The Government's Position On The Merits Provides No Reason To Deny Review.

In arguing that the decision below is correct, the government does no more than repeat the reasoning of the Federal Circuit majority below, Opp. 6-10, which we have rebutted in the petition. Suffice it to say that if the Court grants review, there will be time enough to explore the merits in detail. For present purposes, the depth of the parties disagreement on the merits only emphasizes the need for review, particularly because the Federal Circuit's ruling, with its impact on thousands of EAJA applications, stands alone in rejecting the market-rate approach adopted by this Court nearly 20 years ago in *Missouri v. Jenkins*.[2]

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[2]One statement in the government's opposition requires a brief rejoinder. The government claims that it is permissible to rely on a 1984 committee report even though the report accompanied vetoed legislation, because this Court endorsed that practice in a footnote in *United States v. Enmons*, 410 U.S. 396, 404 n.14 (1973). *See* Opp. 8 n.4. We have already explained that this purported legislative history, even if a legitimate authority, does not support the Federal Circuit's ruling. *See* Pet. 19. In any event, the *Enmons* footnote does not aid the government. Over a four-justice dissent, the footnote permitted reliance on floor statements accompanying unenacted legislation because those statements were repeatedly endorsed in the legislative history accompanying the legislation that was actually enacted. As explained in the petition (at 19), the legislative history that accompanied the enacted version of EAJA did not mention paralegal services, let alone endorse the snippet of faux legislative history on which the government relies.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 06-1717

IN THE

Supreme Court of the United States

Richlin Security Service Co.,
Petitioner,

v.

Michael Chertoff,
Secretary of Homeland Security.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Federal Circuit

BRIEF *AMICI CURIAE* OF NATIONAL ASSOCIATION OF LEGAL ASSISTANTS AND PARALYZED VETERANS OF AMERICA IN SUPPORT OF PETITIONER

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October 12, 2007

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QUESTION PRESENTED

Under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504(a)(1) and 28 U.S.C. § 2412(d)(1)(A), may a prevailing party be awarded attorney fees for paralegal services at the market rate for such services, as four circuits have held, or does EAJA limit reimbursement for paralegal services to cost only, as the Federal Circuit panel majority below held?

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BRIEF *AMICI CURIAE*

INTEREST OF THE *AMICI CURIAE*[1]

1. The **National Association of Legal Assistants (NALA)** is a professional association offering continuing education and professional development programs for paralegals throughout the nation.[2] NALA was established in 1975 as a nonprofit organization under IRS code 501(c)(6). The Association is composed of 6000 individual members and over 90 state and local affiliated associations, representing another 10,000 paralegals. Detailed information about the association may be found on the Web at www.nala.org.

NALA has served as a leader in the development of the paralegal profession by supporting continuing education of paralegals and providing ethical guidelines. In 1975, NALA members adopted the first Code of Ethics and Professional Responsibility for paralegals to serve as a guide for the proper conduct of paralegals in their day-to-day activities. In 1984, NALA members adopted its Model Standards and Guidelines for Utilization of Legal Assistants to serve as a guide for paralegals and supervising attorneys by describing the role of paralegals in the delivery of legal services. The Model is based on research of state-bar-association-adopted guidelines, ethics opinions, and case law related to paralegal utilization. NALA has conducted a nationwide utilization and compensation survey every two to three years since 1986, and survey findings are submitted regularly to the Department of Labor.

In 1989, NALA filed an *amicus curiae* brief in *Missouri v. Jenkins*, 491 U.S. 274 (1989). In the brief, NALA asserted

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[1] No person other than the *amici* and their counsel participated in the writing of this brief or made a financial contribution to the brief. Letters signifying the parties' consent to the filing of this brief are on file with the Court.

[2] In recent years, NALA has found that the term "paralegal" is a preferred term in certain geographic areas; in some states, "legal assistant" is falling by the wayside. This brief uses the terms "legal assistant" and "paralegal" interchangeably.

that paralegals are a recognized and desirable addition to the modern law office. The delegation of work to a skilled paralegal reduces the cost of legal services to the client and increases attorney efficiency and productivity. Today, the contribution and value of paralegals to cost-effective delivery of legal services is indisputable, and recognized even more so than it was in 1989. The paralegal occupation was then and continues to be designated as one of the fastest-growing occupations in the United States. When the brief was filed in 1989, there were an estimated 53,000 paralegals (as of 1984); and a projection of 104,000 by 1995. Today, the Bureau of Labor Statistics estimates that over 200,000 paralegal jobs are held in the United States. The use of paralegals continues to be promoted and encouraged when compensated at market rate as part of court-awarded attorney's fees. In addition, the public interest is served by encouraging attorney use of paralegals when possible and practical.

2. The **Paralyzed Veterans of America ("PVA")** is a national nonprofit organization chartered by the U.S. Congress. *See* 36 U.S.C. § 170101 et seq. Membership in PVA is limited to American citizens who are veterans of the U.S. Armed Forces and have a spinal cord injury or disease. PVA has over 20,000 members, the vast majority of whom use a wheelchair for mobility. The congressionally mandated objects and purposes of the organization include: acquainting the public with the needs and problems of paraplegics; promoting medical research regarding injuries to and diseases of the spinal cord and to advocate for and to foster various programs on behalf of members and other individuals with spinal cord injury or disease. In connection with its mission and programs, PVA maintains an active practice at both the U.S. Court of Appeals for Veterans Claims and the U.S. Court of Appeals for the Federal Circuit litigating cases involving veterans' benefits on behalf of its members and other veterans. The recovery of its legal fees and expenses under the Equal Access to Justice Act in those cases in which the government position is found to not be substantially justified allows PVA

to continue with this important effort on behalf of its members and other veterans. PVA is also involved in litigation from time to time in various civil rights and disability matters involving other similar fee-shifting statutes which may be adversely impacted by the decision. Therefore, PVA has a vital interest in ensuring that the Equal Access to Justice Act and other similar fee-shifting statutes are interpreted consistent with their primary purpose to ensure that the expenses involved in litigation do not deter veterans and others with disabilities from seeking the vindication of their rights.

SUMMARY OF THE ARGUMENT

Certiorari is warranted to review the Federal Circuit's holding that, in cases involving awards under the Equal Access to Justice Act (EAJA), fees for legal assistants should be reimbursed only at cost, rather than according to prevailing market rates. In light of the Federal Circuit's outsized role in EAJA cases, the decision presents an important question of law that may affect EAJA awards in a broad spectrum of cases. The decision below also fails to account for the fact that, even more so now than at the time of this Court's 1989 decision in *Missouri v. Jenkins*, the use of legal assistants is an integral part of the practice of law that allows higher-quality legal services to be provided to clients on a more cost-effective basis. Moreover, because the fees for legal assistants are overwhelmingly billed separately to clients, they should be reimbursed under EAJA at prevailing market rates for the same reasons underlying this Court's holding in *Jenkins* with regard to fees under Section 1988: reimbursement at market rates will encourage the "cost-effective delivery of legal services" and will further the policies underlying the EAJA "by reducing the spiraling cost" of litigation. The panel's supposition that allowing reimbursement at market rates might somehow result in "a less efficient performance of legal services" is simply misplaced.

ARGUMENT

I. The Use of Legal Assistants Has Become An Integral Part of Modern Law Practice.

Beginning in the late 1960s, attorneys began to seek "ways to improve the efficient and cost effective delivery of legal services." Nat'l Ass'n of Legal Assistants, *What Do Legal Assistants Do?*, *available at* http://www.nala.org/whatis.htm (visited July 23, 2007). One response to these efforts came in the form of the growing use of legal assistants (also known as paralegals, *see supra* note 2) to perform tasks that often would otherwise be undertaken by attorneys at a greater cost to the client. The American Bar Association and National Association of Legal Assistants thus have described legal assistants as persons "qualified by education, training or work experience who [are] employed or retained by a lawyer, law office, corporation, governmental agency or other entity [and] who perform[] specifically delegated substantive legal work for which a lawyer is responsible."[3] Such substantive legal work may include, for example, "attending client conferences, corresponding with and obtaining information from clients, witnessing the execution of documents, preparing transmittal letters, and maintaining estate/guardianship trust accounts."[4] Under the supervision of an attorney, legal assistants may also be responsible for locating and interviewing witnesses, conducting investigations and statistical research, conducting legal research, drafting legal documents and

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[3] *See* Nat'l Ass'n of Legal Assistants, *Background and Definition*, *available at* http://www.nala.org/whatis.htm (visited July 23, 2007) (noting that NALA has adopted ABA definition).

[4] ABA Model Guideline 2 for the Utilization of Paralegal Services cmt., *available at* http://www.abanet.org/legalservices/paralegals/lawyers.html#5 (visited July 23, 2007).

pleadings, and summarizing depositions, interrogatories, and testimony.[5]

Performing the tasks described above, legal assistants have – as the New Jersey Committee on Professional Ethics has explained – become "accepted, acceptable, important and indeed, necessary to the practice of law." N.J. Committee on Professional Ethics Op. 647, 126 N.J.L.J. 1525 (1990). In 2004, paralegals and legal assistants held over two hundred thousand jobs, primarily in private law firms but also in corporate legal departments and the government; the number of paralegal and legal assistant jobs is expected to grow by twenty-seven percent or more through 2014.[6]

This widespread use of paralegals and legal assistants allows legal services to be performed more cost-effectively, as paralegals and legal assistants "handle many tasks (under an attorney's supervision) that would otherwise be performed by an attorney" at higher rates.[7] ABA Standing Cmte. on Paralegals, *Information for Lawyers: How Paralegals Can Im-*

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[5] Nat'l Ass'n of Legal Assistants, *What Do Legal Assistants Do?*, *available at* http://www.nala.org/whatis.htm (visited June 12, 2007).

[6] Bureau of Labor Statistics, U.S. Dep't of Labor, *Occupational Outlook Handbook, 2006-07 Edition*, Paralegals and Legal Assistants, *available at* http://www.bls.gov/oco/ocos114.htm (visited July 10, 2007).

[7] ABA Standing Cmte. on Paralegals, *Information for Lawyers: How Paralegals Can Improve Your Practice*, *available at* http://www.abanet.org/legalservices/paralegals/lawyers.html#role (visited Aug. 13, 2007); *see also* Arthur G. Greene & Therese A. Cannon, *Paralegals, Profitability, and the Future of Your Law Practice* fig. 2.1 (2003), *reprinted at* http://www.abanet.org/legalservices/paralegals/lawyers.html (visited July 30, 2007) (providing example of significant savings to client by delegating work such as legal research, reviewing documents, interviewing witnesses, and drafting pleadings to a legal assistant).

prove Your Practice, *available at* http://www.abanet.org/legalservices/paralegals/lawyers.html#role (visited Aug. 13, 2007). Moreover, the use of legal assistants also enhances the quality of legal representation by allowing attorneys to allocate their more expensive time to the most important aspects of a matter.

II. Fees For Legal Assistants Are Overwhelmingly Billed Separately to Clients and Thus Should Be Reimbursed at Market Rates Under EAJA.

1. In 1989, this Court observed in *Missouri v. Jenkins* that separate billing for paralegal services "appears to be the practice in most communities today." 491 U.S. at 289; *see also id.* at 289 n.11 (noting that "77 percent of 1,800 legal assistants responding to a survey of the . . . membership [of the National Association of Legal Assistants] stated that their law firms charged clients for paralegal work on an hourly billing basis"). Three years later, one board of contract appeals – reviewing a claim for EAJA fees – confirmed that the practice of billing for paralegal services at a market rate was widespread, noting both that the government had failed to offer anything "for the record which suggests that the prevailing practice in the metropolitan Washington area is for attorneys not to bill for paralegal services at the going market rate" and that, "[o]n the contrary, in processing multiple cost claims in conjunction with the exercise of our protest jurisdiction, we are left with the understanding that the prevailing practice in this area is, in fact, to bill at market rates." *Spectrum Leasing Corp. v. GSA*, 93-1 B.C.A. (CCH) P25,317, 1992 GSBCA LEXIS 279, at *30-*31 (July 27, 1992).

Eighteen years after this Court's decision in *Jenkins*, the practice of separate billing for paralegal time not only continues, but is entrenched and widely encouraged. For example, the American Bar Association's Standing Committee on Paralegals specifically instructs attorneys that a "paralegal's substantive legal work (i.e., not clerical work) may be billed directly to the client just as an attorney's work is billed, or con-

sidered in setting a flat fee just as an attorney's work would be."[8] In *Jenkins*, this Court reasoned that when

> the prevailing practice is to bill paralegal work at market rates, treating civil rights lawyers' fee requests in the same way . . . makes economic sense. By encouraging the use of lower cost paralegals rather than attorneys wherever possible, permitting market-rate billing of paralegal hours "encourages cost-effective delivery of legal services and, by reducing the spiraling cost of civil rights litigation, furthers the policies underlying civil rights statutes."

491 U.S. at 288. Indeed, this Court continued, "[t]o the extent that fee applicants under § 1988 are not permitted to bill for the work of paralegals at market rates, it would not be surprising to see a greater amount of such work performed by attorneys themselves, thus increasing the overall cost of litigation." *Id.* at 288 n.10.

As the Eleventh Circuit concluded in *Jean v. Nelson*, 863 F.2d 759 (1988), *aff'd on other grounds*, *Commissioner v. Jean*, 496 U.S. 154 (1990), the same reasoning applies equally to the EAJA. "To hold otherwise," the court of appeals emphasized, "would be counterproductive because excluding reimbursement for such work might encourage attorneys to handle entire cases themselves, thereby achieving the same results at a higher overall cost." 863 F.2d at 778.

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[8] ABA Standing Cmte. on Paralegals, *Information for Lawyers: How Paralegals Can Improve Your Practice*, *available at* http://www.abanet.org/legalservices/paralegals/lawyers.html#13 (visited July 10, 2007). *Accord* Nat'l Ass'n of Legal Assistants, *What Do Legal Assistants Do?*, *available at* http://www.nala.org/whatis.htm (visited June 12, 2007) ("Professionally, a paralegal's time for substantive legal work (as opposed to clerical or administrative work) is billed to clients much the same way as an attorney's time, but at a lower hourly rate.").

By contrast, as the D.C. Circuit has emphasized, the use of legal assistants to handle tasks that would otherwise be performed by an attorney at higher rates results not only in lower fees to the client but also in a lower request for reimbursement. *See In re Donovan*, 877 F.2d 982, 992-93 (D.C. Cir. 1989) (per curiam); *see also Sandoval v. Apfel*, 86 F. Supp. 2d 601, 609 (N.D. Tex. 2000) (in approving EAJA award that included fees for an experienced legal assistant in a Social Security case, emphasizing that it was "apparent from the record that [the paralegal] performed services—organizing the case, summarizing the administrative proceedings and medical evidence, and preparing the procedural history, statement of the case, and summary of medical evidence—that might otherwise have been undertaken by [the attorney of record] at a higher hourly rate, while consuming substantially the same amount of time").

2. The panel below nonetheless concluded that legal assistant fees should be reimbursed at cost, relying in part on its view that allowing recovery of paralegal fees at market rates would "create a perverse incentive." Pet. App. 18a. Specifically, the panel posited that fees for an attorney would be limited under EAJA to $125 per hour – "likely far less than his market rate" – while fees for legal assistants could be recovered "at or near the full market rate." *Id.* Thus, the court of appeals reasoned, "treating paralegal fees as attorney's fees would distort the normal allocation of work and result in a less efficient performance of legal services." *Id.*

The premises on which the panel relied in reaching this conclusion are flawed in at least three respects. First, although EAJA (unlike 42 U.S.C. § 1988, at issue in *Jenkins*) imposes a cap of $125 per hour on fees for an attorney (with additional adjustment for inflation available, *see* 28 U.S.C. § 2412(d)(2)(A)(ii)), in many areas of the country there is – as the petition notes, *see* Pet. 21 – scant evidence that rates for legal assistants are high enough to create the "perverse incentives" that the panel decries. To the contrary, EAJA fees for attorneys (when adjusted for inflation) are often compensated

at rates approaching $160 per hour,[9] *see, e.g.*, *Lambert v. Nicholson*, No. 04-815(E), 2006 WL 2619658 (Vet. App. Sept. 7, 2006) (EAJA award included attorney's fees reimbursed at rates of $153.38 and $154.31 per hour), while rates for legal assistants are generally – and often well – below $100 per hour,[10] *see McKay v. Barnhart*, 327 F. Supp. 2d 263, 270 (S.D.N.Y. 2004) (indicating in Social Security case that "the prevailing rate for paralegal services in the Southern District of New York is $75 per hour"); *see also London v. Halter*, 134 F. Supp. 2d 940, 944 (E.D. Tenn. 2001) (deeming $45 per hour to be "prevailing hourly rate for paralegal services in Social Security cases in the Eastern District of Tennessee"). Even the federal government's "Laffey matrix" (on which, the D.C. Circuit has held, parties may rely "as evidence of prevailing market rates for litigation counsel in the Washington, D.C. area") sets the 2005-2006 rate for parale-

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[9] Indeed, in opposing proposed legislation that would have lifted the statutory cap on EAJA attorney's fees, the government expressly emphasized that, in its experience, "courts routinely take advantage of EAJA's current discretionary authority to exceed the hourly rate cap." Statement of Ryan W. Bounds, Chief of Staff, Office of Legal Pol'y, Dep't of Justice, Before the Subcommittee on Courts, the Internet, and Intellectual Property, Committee on the Judiciary, U.S. House of Reps., Concerning H.R. 435, the Equal Access to Justice Reform Act, at 7 (May 23, 2006) (citing, *inter alia*, *Former Employees of Tyco Elecs. Fiber Optics Div. v. U.S. Dep't of Labor*, 350 F. Supp. 2d 1075, 1093 (C.I.T. 2004), in which court awarded attorney's fees at $158.70 for work performed in 2004), *available at* www.judiciary.house.gov/media/pdfs/bounds052306.pdf (visited Sept. 20, 2007).

[10] *See, e.g.*, Nat'l Ass'n of Legal Assistants, 2004 National Utilization and Compensation Survey Report tbl. 3.5, *available at* www.nala.org/Survey_Table.htm (visited June 21, 2007) (in 2004 nationwide survey of legal assistants, only thirty-eight percent reported a current billing rate greater than $90 per hour).

gals at $115 per hour – *i.e.*, below the $125-per-hour cap even without adjusting it for inflation.[11]

Moreover, even if the hourly rates for paralegals were to converge with the statutorily capped rate for attorneys, that fact – standing alone – would not militate against awarding fees for paralegals at their prevailing market rates. In an analogous case, the Court of Claims declined to reduce the rates for an associate attorney notwithstanding that, as a result of EAJA's statutory cap, such rates would approach those for partners working on the same case. In reasoning that applies fully to this case, the Court of Claims explained that it was "constrained to reduce the hourly rates . . . for partner time simply because those rates must be brought within the statutory cap. The same rationale," the Court continued, "would not apply to the rates sought for associate time since they are already at or below EAJA's . . . limit. Nothing in the legislative history suggests that Congress intended courts to preserve . . . proportionality in hourly rates when making EAJA fee awards." *Kunz Constr. Co. v. United States*, 16 Cl. Ct. 431, 439-40 (1989), *aff'd mem.*, 899 F.2d 1227 (Fed. Cir. 1990).

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[11] *See United States Attorney's Office for the District of Columbia*, Laffey Matrix 2003-2006, *available at* http://www.usdoj.gov/usao/dc/Divisions/Civil_Division/Laffey_Matrix_5.html (visited July 10, 2007).

Although the Department of Justice makes clear that the "matrix does not apply in cases in which the hourly rate is limited by statute[s]," such as Section 2412(d), the matrix is nonetheless instructive with regard to the prevailing market rates for paralegals. *Cf. Role Models Am., Inc. v. Brownlee*, 353 F.3d 962, 969-70 (D.C. Cir. 2004) (in concluding that appellant seeking EAJA award had not met its burden of justifying rates for legal assistants, court noted that appellant had neither "submitted . . . information about the prevailing market rate for law clerks and legal assistants in the Washington area, nor . . . referred to either of the two matrices that we have previously said litigants may rely upon when seeking fees").

In any event, the relevant question in interpreting the EAJA is not whether the rates for paralegals and attorneys may have converged or what economic incentives such a convergence might create, but instead whether Congress intended to permit market rate reimbursement for legal assistant services when it enacted and re-enacted the EAJA nearly three decades ago. Because – as the petition explains (at 20-21) – the prevailing market rates for paralegals during the early 1980s were well below the statutory cap, there was no reason for Congress to believe (and thus no reason for courts interpreting the EAJA to consider) that the two sets of rates might eventually converge.

Second, contrary to the assumption of the court of appeals, there is no reason to believe that the increased use of legal assistants will always result in the "less efficient performance of legal services." In response to a "demand for expertise," legal assistants have increasingly "develop[ed] knowledge and skills in highly technical or specialized subject areas." Nat'l Federation of Paralegal Ass'ns, *Paralegal Roles and Responsibilities*, *available at* http://www.paralegals.org/displaycommon.cfm?an=1&subarticlenbr=699 (visited June 21, 2007). When reviewing requests for EAJA reimbursement for legal assistants who specialize in a particular area of the law, district courts have expressly acknowledged that an attorney "is not necessarily able to" accomplish the tasks performed by legal assistants "in less time than it takes an experienced paralegal to do so." *Sandoval v. Apfel*, 86 F. Supp. 2d 601, 609 & n.12 (N.D. Tex. 2000) (approving EAJA award that included market rate for legal assistant with "extensive experience performing paralegal work in social security disability litigation").

Third, to the extent that in some cases legal assistants may require more hours than an attorney to accomplish a particular task, the disparity between the hourly rates for an attorney and those of a legal assistant means that the use of legal assistants will remain cost-effective, as courts considering EAJA requests have repeatedly recognized. *See Nickola v.*

Barnhart, No. 03-C-622-C, 2004 WL 2713075, at *1 (W.D. Wis. Nov. 24, 2004) (granting EAJA award for 33.15 hours of attorney time at $148.75 per hour and 44.2 hours of paralegal/law clerk time at $95 per hour and noting that "[a]lthough it might have taken more time for a law clerk to draft a brief than had an attorney drafted it, overall the use of law clerks in this case appears to have been a money-saving measure because it reduced the amount of time the attorney spent on the case").

Indeed, the cost benefits of using legal assistants are so well-recognized that some courts have in fact reduced EAJA awards seeking reimbursement for attorney time for tasks that they regard as more properly performed by law clerks or legal assistants. In *Wilson v. Barnhart*, No. 1:06CV00062, 2006 WL 3455071, at *1 (W.D. Va. Nov. 30, 2006), the district court explained that, just as "[i]t is proper to award a reduced hourly rate under the EAJA for nonattorney time spent by paralegals, law clerks, and law students 'on the theory that their work contributed to their supervising attorney's work product, was traditionally done and billed by attorneys, and could be done effectively by nonattorneys under supervision for a lower rate, thereby lowering overall litigation costs,'" "it is not proper to award a full attorney rate for activities that should more effectively be performed by nonlawyers," *id.* (citations omitted) (in Social Security case, reducing EAJA award from 15.25 hours at $125 per hour for attorney time to eight hours of attorney time (at $125) and four hours of nonattorney time at $75 per hour).

In any event, the answer to any perceived inefficiencies resulting from the use of legal assistants is not to deny reimbursement at market rates altogether, but instead for courts to follow the same practice that they do with other aspects of EAJA requests – *i.e.*, scrutinize the qualifications of legal assistants and requests for reimbursement of legal assistant fees and reduce any awards as necessary to account for such inefficiencies. *See, e.g.*, *Teixeira v. Nicholson*, 2006 U.S. App. Vet. Claims LEXIS 295 (Vet. App. Apr. 4, 2006) (reducing

EAJA award in light of finding that "representation by multiple counsel resulted in duplicative work and excessive billing for time spent by counsel conferring with each other"). *Cf. Commissioner v. Jean*, 496 U.S. 154, 163 (1990) (emphasizing that "a district court will always retain substantial discretion in fixing the amount of an EAJA award. Exorbitant, unfounded, or procedurally defective fee applications . . . are matters that the district court can recognize and discount."). Thus, one district court recently approved an EAJA award that included legal assistant fees at a rate of $75 per hour but reduced the number of hours covered by the award in light of its determination that "much of the time billed may not have been entirely productive." *See Dudelson v. Barnhart*, No. 03 Civ. 7734 (RCC) (FM), 2007 U.S. Dist. LEXIS 19124 (S.D.N.Y. Mar. 20, 2007).

III. Certiorari Is Warranted To Review This Important Question.

As outlined above, *see supra* at 4-5, the Federal Circuit's holding in this case that prevailing parties under EAJA may only be awarded fees for legal assistants at cost is inconsistent with the realities of modern law practice, which now relies heavily on legal assistants – whose time is billed to clients at prevailing market rates – to improve both the cost and quality of legal services delivered to clients. By providing an incentive for attorneys to handle more aspects of a case themselves, rather than delegating work to legal assistants, the decision below threatens to increase the costs of legal services to clients and, ultimately, reimbursements under EAJA. *See supra* at 7.

Because the many cases awarding EAJA fees involve a wide variety of subject matters,[12] the potential effects of the

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[12] *See, e.g., Former Employees of Tyco Elecs., Fiber Optics Div. v. United States Dep't of Labor*, 350 F. Supp. 2d 1075, 1093 (C.I.T. 2004) (awarding EAJA fees in NAFTA trade adjustment assistance case); *Masonry Masters, Inc. v. Nelson*, 105 F.3d 708 (D.C. Cir. 1997) (EAJA award in immigration case); *Jazz Photo*

decision below alone would warrant certiorari. However, certiorari is particularly warranted given the Federal Circuit's outsized role in EAJA cases. As the petition for certiorari explains (at 11-12), the Federal Circuit has appellate jurisdiction not only over – as here – federal administrative tribunals, but also over cases from Article I courts such as the Court of Federal Claims. Unless the decision below is reversed, it will thus have precedential effect in all of these tribunals and courts, prompting them to award fees for legal assistants only at cost notwithstanding the widespread and well-accepted practice of billing them to clients at market rates.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, certiorari should be granted.

Corp. v. United States, No. 04-00494, 2007 Ct. Intl. Trade LEXIS 107 (C.I.T. July 16, 2007) (partial EAJA award in case involving customs protest); *Brungardt v. Comm'r of Social Security*, No. 06-15681, 2007 U.S. App. LEXIS 11217 (11th Cir. May 9, 2007) (EAJA award in Social Security case); *Healey v. Leavitt*, 485 F.3d 63, 65 (2d Cir. 2007) (EAJA award in class action arising out of termination or reduction of home health care services to elderly and disabled); *Joyce v. Potter*, No. 5:06-cv-339-Oc-10GRJ, 2007 U.S. Dist. LEXIS 51115 (M.D. Fla. July 16, 2007) (EAJA award in case by U.S. Postal Service contractor involving due process violations); *Agosto v. Nicholson*, No. 04-0431(E), 2007 U.S. App. Vet. Claims LEXIS 1121 (Vet. App. July 13, 2007) (EAJA award in veteran's case); *League of Wilderness Defenders-Blue Mountains Biodiversity Project v. Smith*, 491 F. Supp. 2d 980 (D. Or. May 17, 2007) (EAJA award in environmental case); *In re Donovan*, 877 F.2d 982, 992-93 (D.C. Cir. 1989) (per curiam) (EAJA award to subject of independent counsel investigation).

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IN THE
Supreme Court of the United States

RICHLIN SECURITY SERVICE COMPANY,
Petitioner,

v.

MICHAEL CHERTOFF,
SECRETARY OF HOMELAND SECURITY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITIONER'S BRIEF

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QUESTION PRESENTED

Under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504(a)(1) and 28 U.S.C. § 2412(d)(1)(A), may a prevailing party be awarded attorney fees for paralegal services at the market rate for such services, or does EAJA limit reimbursement for paralegal services to cost only?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit is reported at 472 F.3d 1370 (2006), and is reproduced in the appendix to the petition for a writ of certiorari at 1a. The opinion of the Department of Transportation Board of Contract Appeals is reported at 2005 WL 1635099 (2005), and is reproduced at Pet. App. 25a. The Federal Circuit's supplemental opinion issued in response to petitioner's petition for rehearing is reported at 482 F.3d 1358 (2007), and is reproduced at Pet. App. 54a. The Federal Circuit's unreported order denying rehearing and rehearing en banc is reproduced at Pet. App. 57a.

JURISDICTION

The judgment of the United States Court of Appeals for the Federal Circuit was entered on December 26, 2006. Pet. App. 1a. Petitioner filed a timely petition for rehearing en banc on January 8, 2007, which the Federal Circuit treated as a petition for panel rehearing and rehearing en banc and denied on April 3, 2007. Pet. App. 57a. The petition for a writ of certiorari was filed on June 25, 2007, and was granted on November 13, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The Equal Access to Justice Act (EAJA) authorizes an award of fees and other expenses to certain parties who prevail against the United States in court or in adversary administrative proceedings.

5 U.S.C. § 504, the portion of EAJA that applies to adversary administrative proceedings, provides in relevant part:

(a)(1) An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

* * *

(b)(1) For the purposes of this section –

(A) "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the agency to be necessary for the preparation of the party's case, and reasonable attorney or agent fees. (The amount of fees awarded under this section shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the agency involved, and (ii) attorney or agent fees shall not be awarded in excess of $125 per hour unless the agency determines by regulation that an

increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents for the proceedings involved, justifies a higher fee.)[1]

STATEMENT OF THE CASE

The Equal Access to Justice Act provides that certain parties that prevail against the federal government in court and adversary administrative proceedings are entitled to an award of fees and other expenses. Petitioner Richlin Security Service Company, a sole proprietorship, prevailed in administrative and judicial proceedings against the federal government and was awarded attorney fees and other expenses under EAJA by the Department of Transportation Board of Contract Appeals (the Board). The question presented is whether such an award may include compensation for paralegal services at rates that clients generally pay for paralegal services in the relevant legal market, as this Court held was appropriate under 42 U.S.C. § 1988 in *Missouri v. Jenkins*, 491 U.S. 274, 284-89 (1989), or whether, as the Federal Circuit held, those services may only be

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[1]The nearly identical portions of EAJA applicable to recovery of fees and other expenses incurred in court proceedings are codified at 28 U.S.C. §§ 2412(d)(1)(A), (d)(2)(A). Petitioner's fee application at issue here sought recovery for fees incurred in adversary proceedings before the Department of Transportation's Board of Contract Appeals and, thus, was filed under 5 U.S.C. § 504. In general, citations in this brief to provisions of section 504 are accompanied by citations to the corresponding provisions of section 2412(d). The relevant portions of section 2412(d) are contained in an addendum to this brief.

compensated at the cost to the attorney, regardless of how the marketplace values them.

A. The Equal Access To Justice Act

EAJA was first enacted in 1980 for a three-year period beginning on October 1, 1981 based on Congress's express finding that individuals, small businesses, and non-profit organizations "may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense involved in securing the vindication of their rights in civil actions and in administrative proceedings." Pub. L. No. 96-481, § 202(a), 94 Stat. 2321, 2325 (1980); *see also id.* at §§ 202(b), (c)(1), 94 Stat. at 2325 (noting government's "greater resources" and that EAJA's purpose was "to diminish the deterrent effect of seeking review of, or defending against, governmental action."); *Comm'r, INS v. Jean*, 496 U.S. 154, 163 (1990) ("The specific purpose of the EAJA is to eliminate for the average person the financial disincentive to challenge unreasonable governmental actions."). In addition, Congress wanted to "encourag[e] private parties to vindicate their rights and [thereby to] 'curb[] excessive regulation and the unreasonable exercise of Government authority.'" *Id.* at 164-65 (quoting H.R. Rep. No. 96-1418, at 12 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4991). In 1985, Congress reenacted EAJA and made it permanent. Pub. L. No. 99-80, 99 Stat. 183 (1985).

EAJA provides that "fees and other expenses" shall be awarded to eligible parties who have prevailed in adversary administrative proceedings or in court against the federal government, unless the agency adjudicator or court finds that the position of the

United States "was substantially justified or that special circumstances make an award unjust." 5 U.S.C. § 504(a)(1); 28 U.S.C. § 2412(d)(1)(A). An individual is eligible for fees if his or her net worth does not exceed $2 million, while a business is eligible if its net worth does not exceed $7 million and it had 500 or fewer employees when the action was commenced. 5 U.S.C. § 504(b)(1)(B); 28 U.S.C. § 2412(d)(2)(B). Certain charitable organizations and cooperatives are eligible regardless of size or net worth. *Id.*; 5 U.S.C. § 504(b)(1)(B).[2]

"Fees and other expenses" are defined to include "reasonable attorney or agent fees." 28 U.S.C. § 504(b)(1)(A); *see also* 28 U.S.C. § 2412(d)(2)(A) (defining "fees and other expenses" to include "reasonable attorney fees"). EAJA does not leave the amount of fees to the broad discretion of the court or agency adjudicator, but states that the amount of fees "shall be based upon prevailing market rates," subject to a dollar-per-hour cap on attorney fees that may be adjusted in certain circumstances. 5 U.S.C. § 504(b)(1)(A)(ii); 28 U.S.C. § 2412(d)(2)(A). At the time of EAJA's enactment, the adjustable cap was $75 per hour.[3]

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[2]Originally, the net-worth limits for individuals and businesses were $1 million and $5 million, respectively. *See* Pub. L. No. 96-481, §§ 203(a)(1), 204(a), 94 Stat. at 2326, 2328. The current limits were set in 1985. Pub. L. No. 99-80, §§ 1, 2, 99 Stat. at 185.

[3]In 1996, Congress raised the cap to $125 per hour, effective March 29, 1996. Pub. L. No. 104-121, §§ 231-233, 110 Stat. 847, 862-64 (1996). The 1996 hike from $75 per hour to $125 per hour

(continued...)

As noted above, the cap is not absolute, but may be adjusted upward on two bases. First, any court, or an administrative tribunal authorized by regulation to do so, may award fees above the statutory cap if "an increase in the cost of living ... justifies a higher fee." 5 U.S.C. § 504(b)(1)(A); 28 U.S.C. § 2412(d)(2)(A). Courts and authorized administrative tribunals generally award cost-of-living adjustments as a matter or course when market rates exceed the unadjusted statutory cap. *See, e.g., Meyer v. Sullivan*, 958 F.2d 1029, 1033-35 (11th Cir. 1992); *Johnson v. Sullivan*, 919 F.2d 503, 504-05 (8th Cir. 1990) (citing cases); *see also Pierce v. Underwood*, 487 U.S. 552, 571-72 (1988) (suggesting that cost-of-living increases are automatic by referring repeatedly to fee cap as "$75 per hour (adjusted for inflation)"). The cap is adjusted upward by measuring the increase in the cost of living between the date of enactment of the statutory cap and the date the relevant legal services were rendered, typically by using the Bureau of Labor Statistics "all-items" index, a general measure of inflation. *See, e.g., Dewalt v. Sullivan*, 963 F.2d 27, 29-30 (3d Cir. 1992); *Johnson*, 919 F.2d at 504. Courts have held that the fee cap may not be adjusted based on inflation in the cost of legal services, *see, e.g., Harris v. Sullivan*, 968 F.2d 263 (2d

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[3](...continued)
reflected the increase in the cost of living between EAJA's original October 1, 1981, effective date and the hike's March 1996 effective date. *See* U.S. Dep't of Labor, Bureau of Labor Statistics, Consumer Price Index, All Urban Consumers, available at ftp://ftp.bls.gov/pub/special.requests/cpi/cpiai.txt (showing 66.7% cost-of-living increase from October 1981 through March 1996).

Cir. 1992); *Dewalt*, 963 F.2d at 29-30, and, thus, the fee cap, even when adjusted for inflation, has failed to keep up in recent years with the hyper-inflation in the legal services market. The current inflation-adjusted cap is approximately $168 per hour.

Second, courts and authorized administrative tribunals may award fees above the cap — whether inflation-adjusted or not — based on the presence of any "special factor," one of which is mentioned in the statute: "the limited availability of qualified attorneys for the proceedings involved." 5 U.S.C. 504(b)(1)(A); 28 U.S.C. § 2412(d)(2)(A). This Court has held that this statutory formulation refers to "attorneys having some distinctive knowledge or specialized skill needful for the litigation in question — as opposed to an extraordinary level of the general lawyerly knowledge and ability useful in all litigation." *Pierce*, 487 U.S. at 572. The Court cited patent law and foreign law as examples of distinctive knowledge that would justify an award above the cap, *id.*, and, although this basis for enhancement has been allowed only rarely post-*Pierce*, the lower courts have identified other examples. *See, e.g., David v. Sullivan*, 777 F. Supp. 212, 219-21 (E.D.N.Y. 1991) (Medicare law).[4]

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[4]As noted, administrative tribunals must be authorized by regulation to adjust the cap. Some tribunals have been authorized to exceed the cap, *see, e.g.*, 5 C.F.R. §§ 2430.4, .5 (Federal Labor Relations Authority); 29 C.F.R. §§ 2704.107, .201(b) (Federal Mine Safety and Health Review Commission); some, including the tribunal below, have not. *See* Pet. App. 38a.

B. Proceedings On The Merits

The merits of this litigation can be summarized briefly. Mistakes in contracts between petitioner Richlin Security Service Company and what was then the Immigration and Naturalization Service (and is now part of the Department of Homeland Security) resulted in the substantial underpayment of Richlin's employees. *See Richlin Sec. Serv. Co. v. Chertoff*, 437 F.3d 1296, 1297 (Fed. Cir. 2006). The underpayments were of such magnitude to a small business like Richlin that, before it won this litigation, Richlin had been unable to pay its employees what it owed them. *Id.* at 1298 (citing *Richlin Sec. Serv. Co. v. Rooney*, 18 F. App'x 843, 844-45 (Fed. Cir. 2001)). In lengthy proceedings before both the Board and the Court of Appeals for the Federal Circuit, the government contended that Richlin was required by law to suffer the consequences of the contractual mistakes. The Federal Circuit rejected that position as inconsistent with the terms of the contract and controlling case law, *see Meissner v. Richlin Sec. Serv. Co.*, 1998 WL 228175, *4 (Fed. Cir. 1998), and, on remand from a later appeal, the Board eventually awarded Richlin the amount of the additional wages, payroll taxes, and workers' compensation premiums that Richlin was required to pay as a result of the mistakes. Pet. App. 3a.

C. Fee Proceedings

After prevailing on the merits, Richlin sought an award of fees and other expenses under EAJA for the time spent over nearly nine years by its lawyers and paralegals before the Board. The Board found that Richlin met EAJA's size and net-worth limitations, 5

U.S.C. § 504(b)(1)(B), that it was a prevailing party, *see id.* § 504(a)(1), and that the government's position on the merits was not "substantially justified." *See id.* The Board awarded Richlin approximately $50,000 for work done by the company's lawyers. *See* Pet. App. 5a.

The Board did not, however, award Richlin fees at the $50 to $95 per hour market rates for paralegal services charged to Richlin over the course of the proceedings. It noted that EAJA does not "expressly provide for the reimbursement of paralegal services at the market rate," *id.* at 6a, and thus held that paralegal services are reimbursable only at *the attorney's* cost, even where, as is the case here, paralegal time is billed to *the client* at hourly market rates in the relevant legal market and not at the attorney's cost as an out-of-pocket expense. The Board took judicial notice of paralegal salaries in the Washington, D.C. area "as reflected on the internet" and awarded Richlin $35 per hour as the "reasonable cost to the [law] firm." *Id.* (quoting Board decision). The Board awarded approximately $10,600, representing roughly 300 hours of compensable paralegal time. *See id.*

A divided panel of the Federal Circuit affirmed. The panel majority acknowledged this Court's ruling in *Missouri v. Jenkins*, 491 U.S. 274, 284-89 (1989), that, under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, paralegal services are a component of "attorney's fees" compensable at market rates, as long as those services are separately billed in the relevant market. The majority further acknowledged the Court's repeated admonition that "fee-shifting statutes' similar language is a 'strong

indication' that they are to be interpreted alike." Pet. App. 13a (quoting *Independent Federation of Flight Attendants v. Zipes*, 491 U.S. 754, 758 n.2 (1989)). The majority nevertheless distinguished EAJA from section 1988, largely on the ground that the former contemplates an award of "expenses," which purportedly includes the cost to law firms of paralegals, while the latter does not. Pet. App. 15a, 19a. The court of appeals also relied on EAJA's per-hour rate cap for attorney fees as justification for limiting recovery for paralegal services, noting that "it seem[ed] unlikely" that Congress would have capped paralegal and attorney services at the same level. Pet. App. 16a. In so holding, the court of appeals acknowledged that its ruling was at odds with an Eleventh Circuit decision, *Jean v. Nelson*, 863 F.2d 759, 778 (1988), *aff'd on other issue, Comm'r, INS v. Jean*, 496 U.S. 154 (1990), which held that fees for paralegal services are compensable at market rates under EAJA.

Senior Circuit Judge Plager dissented on the ground that "the panel's position is at variance with established Supreme Court law," Pet. App. 20a-21a, relying on this Court's statement in *Jenkins* that a "'reasonable attorney's fee' cannot have been meant to compensate only work performed personally by members of the bar," but was also intended to compensate the work of "others whose labor contributes to the work product for which an attorney bills her client." *Id.* at 21a (quoting *Jenkins*, 491 U.S. at 285).

Richlin petitioned for rehearing en banc, explaining that, in addition to the acknowledged conflict with the

Eleventh Circuit, the Federal Circuit's ruling had opened a conflict with decisions of three other circuits. The petition also noted that a Senate committee report that the panel majority had relied on did not, in fact, support its ruling, and that, in any event, the report was not genuine legislative history because it had accompanied a 1984 version of EAJA that was vetoed by President Reagan, not the 1985 version that was actually enacted.

The panel responded to the rehearing petition in a supplemental opinion. *See* Pet. App. 54a. With respect to the purported legislative history, the court of appeals acknowledged its earlier reliance on a committee report that accompanied vetoed legislation, but held that because the President's veto related to issues other than the compensability of paralegal services, the "earlier legislative history" drafted by a different Congress in 1984 was "pertinent to the 1985 enactment on the issue presented here." *Id.* at 56a n.2. Senior Judge Plager dissented again "on the basis of his dissent from the original panel opinion." *Id.* In an order accompanying its supplemental opinion, the Federal Circuit denied rehearing and rehearing en banc. Pet. App. 57a.

SUMMARY OF ARGUMENT

A. Fees incurred for paralegal services are compensable at market rates under EAJA. In *Missouri v. Jenkins*, 491 U.S. at 285, the Court held, first, that paralegal services are "attorney's fees" under 42 U.S.C. § 1988 because that term logically includes charges not only for the work of members of the bar, but also for other law firm personnel whose services contribute to the lawyer's work product. *Jenkins* also held that

paralegal services are compensable at market rates under section 1988 if they are billed separately on that basis in the relevant legal community, and that separate paralegal billing encourages efficient delivery of legal services. On the second question addressed in *Jenkins* — how to value paralegal services if they are statutory attorney fees — EAJA provides its own answer because all compensable fees, including attorney fees, must be awarded at "prevailing market rates." 5 U.S.C. § 504(b)(1); 28 U.S.C. § 2412(d)(1)(A). Thus, under EAJA, if paralegal services are "attorney fees," as they were held to be in *Jenkins*, they are indisputably compensable at market rates.

Jenkins's determination that section 1988 fees include paralegal services applies to EAJA. "Attorney's fees" under section 1988 and "attorney fees" under EAJA are nearly identical terms, and, ordinarily, Congress's use of the same or similar terms should be accorded the same meaning statute to statute. The Court has applied that principle of statutory construction with special force to federal fee-shifting statutes in light of their generally similar purposes, and it should be applied here. At the time of EAJA's enactment, courts already had interpreted section 1988 and other fee-shifting statutes to require that fees, *including fees incurred for paralegal services*, be awarded at market rates. If anything, the Congress that enacted EAJA, and expressly required that fees be awarded at "prevailing market rates," would have been more likely than the Congress that enacted section 1988, and required only that fees be "reasonable," to have provided compensation for paralegal services in a manner that mimics the market.

B. The Federal Circuit erred in maintaining that *Jenkins* is inapplicable here in light of EAJA's adjustable dollar-per-hour cap on attorney rates. The Federal Circuit stated that if fees for paralegal services were "attorney fees," in light of the cap, law firm charges for paralegal services would be fully recoverable while charges for attorney services would not, leading to the supposed overuse of paralegals and undermining *Jenkins*'s efficiency rationale. The Federal Circuit's view is misguided for a host of reasons, not least of which is that it conflicts with reality. When EAJA was enacted and reenacted in 1980 and 1985, respectively -- the relevant vantage points from which to assess Congress's intent and, thus, the Federal Circuit's "overuse" argument — market rates for most or all lawyers practicing in most locations were at or below the EAJA cap. Therefore, Congress would not have expected market-rate recovery for paralegal services to result in "overuse" of paralegals in comparison to the higher-priced lawyers for whom they work. In any event, limiting reimbursement for paralegal services to the law firm's cost, as the Federal Circuit held EAJA requires, would improperly drive up the cost of litigation for clients — the people that EAJA was intended to benefit.

C. The Federal Circuit's holding that paralegal services are compensable at the *cost* of those services to the *lawyer* is doubly wrong. Treating paralegal services as an item awardable at cost is at odds with the judicial understanding of EAJA, under which cost-based awards generally are for out-of-pocket expenses charged by third-party vendors. These expenses include items such as travel costs and long-distance

phone calls, not the work of in-firm personnel (which is billed separately by the firm at market rates or recovered as overhead through the attorneys' rates).

Even if it were appropriate under EAJA to reimburse paralegal expenses at "cost," reimbursement should be based on the cost incurred by the *client*, not the *lawyer*. It is clients (not lawyers) whose interests EAJA seeks to protect, and basing the client's reimbursement for paralegal services on what it costs the lawyer to employ the paralegal leaves the client with a loss that bears no rational relationship to the costs faced by the client or EAJA's purposes. After all, EAJA provides an award of fees and other expenses to the "prevailing *party*," 5 U.S.C. § 504(a)(1); 28 U.S.C. § 2412(d)(1)(A), not that party's lawyer. Awarding paralegal expenses based on the cost incurred by the *client* would avoid that irrationality; and because doing so reflects market reality, it also underscores why paralegal services are "attorney fees" under EAJA that should be awarded at "prevailing market rates."

ARGUMENT

A. Paralegal Services Are Compensable At Market Rates Under This Court's Decision In *Missouri v. Jenkins* And The Text And Structure Of EAJA.

The reasoning of this Court's decisions, together with the statutory text, demonstrate that "attorney fees" under EAJA includes paralegal services. Accordingly, the Federal Circuit's decision must be reversed because the "amount of fees awarded under" EAJA "shall be based upon prevailing market rates for the kind and quality of the services furnished." 5 U.S.C. § 504(b)(1)(A)(ii); 28 U.S.C. § 2412(d)(2)(A).

1. In *Missouri v. Jenkins*, 491 U.S. 274, the Court considered whether and on what basis fees incurred for paralegal services are awardable as "attorney's fees" under the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988. The Court first held that, in using the term "attorney's fee," Congress must have meant to compensate not only the work of members of the bar, but the work of others, including paralegals, whose services contribute to the lawyer's work product. *Jenkins*, 491 U.S. at 285. As the Court put it:

> Clearly, a "reasonable attorney's fee" cannot have been meant to compensate only work performed personally by members of the bar. Rather, the term must refer to a reasonable fee for the work product of an attorney. Thus, the fee must take into account the work not only of attorneys, but also of secretaries, messengers, librarians, janitors, and others whose labor contributes to the work product for which an attorney bills her client; and it must also take account of other expenses and profit. The parties have suggested no reason why the work of paralegals should not be similarly compensated, nor can we think of any. We thus take as our starting point the self-evident proposition that the "reasonable attorney's fee" provided for by statute should compensate the work of paralegals, as well as that of attorneys.

Id.

The Court then turned to what it termed the "more difficult" question of how paralegal services should be "valuated." *Id.* Relying on its prior fee-shifting precedents holding that attorney fees are to be

compensated at "market rate," *see id.* at 285-86 (citing, *e.g.*, *Blum v. Stenson*, 465 U.S. 886, 895 & n.11 (1984); *Hensley v. Eckerhart*, 461 U.S. 424, 447 (1983)), the Court explained that

> the prevailing 'market rate' for attorney time is not independent of the manner in which paralegal time is accounted for. Thus, if the prevailing practice in a given community were to bill paralegal time separately at market rates, fees awarded the attorney at market rates for attorney time would not be fully compensatory if the court refused to compensate hours billed by paralegals or did so only at "cost."

Id. at 286-87 (footnote omitted). Moreover, the Court explained, "encouraging the use of lower cost paralegals rather than attorneys wherever possible, ... 'encourages cost-effective delivery of legal services.'" *Id.* at 288 (quoting *Cameo Convalescent Ctr., Inc. v. Senn*, 738 F.2d 836, 846 (7th Cir. 1984)).

2. Under EAJA, we are not faced with what *Jenkins* called the "more difficult" question; if paralegal services are "attorney fees" under EAJA, they are necessarily compensable at "prevailing market rates." *See* 5 U.S.C. § 504(b)(1)(A); *accord* 28 U.S.C. § 2412(d)(2)(A). In other words, if *Jenkins*'s holding that "attorney's fees" under 42 U.S.C. § 1988 includes paralegal services — what *Jenkins* called a "self-evident proposition," 491 U.S. at 285 — applies to EAJA, the decision below must be reversed.

Jenkins applies with full force to EAJA. To begin with, the statutory term "attorney fees" used in EAJA is nearly identical to the term "attorney's fee"

construed in *Jenkins*. And, under ordinary principles of statutory construction, the Court generally accords the same meaning it has given Congress's use of a term in one statute to Congress's use of the same or a similar term in another statute. *See, e.g., Trans World Airlines, Inc. v. Morales*, 504 U.S. 374, 383-84 (1992).

That principle of construction applies with special potency to federal fee-shifting statutes, such as section 1988 and EAJA, for two reasons. First, "there are over 100 separate [federal] statutes providing for the award of attorney's fees." *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 562 (1986); *see also Marek v. Chesny*, 473 U.S. 1, 43 (1985) (Brennan, J., dissenting) ("Congress has enacted well over 100 fee-shifting statutes."). It makes no sense, absent compelling circumstances to the contrary, to ascribe to Congress an unexpressed intent to define the same or similar terms differently. Rational legislators would not create disparate definitions for dozens of the same or similar statutory terms in dozens of statutes because doing so would cause chaos for litigants, lawyers, and courts trying to discern their meaning. Thus, in the case of federal fee-shifting statutes, according the same meaning to the same or similar statutory texts marries fidelity to congressional intent with the practical needs of the bar, the judiciary, and the members of the public that fee-shifting statutes are intended to benefit. For that reason, whether the issue is the parameters of a "reasonable" fee, *see City of Burlington v. Dague*, 505 U.S. 557, 562 (1992), who is a "prevailing party," *see Hensley*, 461 U.S. at 433 & n.7, or, as here, what is encompassed by the term "attorney fees," courts generally should resolve the

issue consistently across the range of federal fee-shifting statutes.

Second, this principle of statutory construction is especially applicable in the fee-shifting context in light of the common purposes of most, if not all, federal fee-shifting provisions, including section 1988 and EAJA. Those provisions are intended to encourage vindication of federal rights by reducing the cost of challenging unlawful conduct and, in turn, inducing future compliance with federal law. *See supra* at 4 (discussing these dual purposes of EAJA); *Delaware Valley Citizens' Council*, 478 U.S. at 559-60 (same with respect to section 1988); *Hensley*, 461 U.S. at 429 (same); *see also, e.g., New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 63 (1980) (same purposes of fee-shifting provision of Title VII of the Civil Rights Act of 1964).

The Court made this point in *Northcross v. Board of Education*, 412 U.S. 427 (1973) (per curiam), where it gave the fee-shifting provision of one civil rights statute the same meaning it had earlier given to the fee-shifting provision of another civil rights statute. The Court noted that the "similarity of language" in the two provisions "is, of course, a strong indication that the two statutes should be interpreted *pari passu*." *Id.* at 428. It then went on to explain that "'the two provisions share the same *raison d'être*'" — to vindicate federal rights and to encourage individuals to seek judicial relief." *Id.* (quoting *Johnson v. Combs*, 471 F. 2d 84, 86 (5th Cir. 1972), relying on *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968)); *see also Delaware County Citizens' Council*, 478 U.S. at 560 ("Given the common purpose of §

304(d) [of the Clean Air Act] and § 1988 to promote citizen enforcement of important federal policies, we find no reason not to interpret both provisions governing attorney's fees in the same manner.").

For the foregoing reasons, the Court has accorded uniform application to the same or similar terms in fee-shifting statutes more frequently, more consistently, and more forcefully than in any other context of which we are aware. In light of the "similar" language of "many ... federal fee-shifting statutes," the Court has noted that "our case law construing what is a 'reasonable' fee applies uniformly to all of them." *Dague*, 505 U.S. at 562; *see also, e.g., Zipes*, 491 U.S. at 754 n.2 ("We have stated in the past that fee-shifting statutes' similar language is a 'strong indication' that they are to be interpreted alike.") (quoting *Northcross*, 412 U.S. at 428); Pet. App. 13a n.7 ("The Supreme Court has repeatedly made clear that the various federal attorney's fees statutes should be construed to reach a uniform result.") (quoting *Sacco v. United States*, 452 F.3d 1305, 1310 (Fed. Cir. 2006)). And, in an EAJA case, *Sullivan v. Hudson*, 490 U.S. 877, 888-90 (1989), the Court interpreted the term "civil action" under 28 U.S.C. § 2412(d)(1)(A) to include fees incurred in certain administrative proceedings, in significant part because of this Court's construction of similar terms in *Delaware Valley Citizens' Council*, 478 U.S. at 558, and *New York Gas Light*, 447 U.S. at 60. Indeed, this principle of statutory construction is so powerful with respect to fee-shifting statutes that, in *Hensley*, the Court applied it *prospectively*, holding, in a section 1988 case, that "[t]he standards set forth in this opinion are generally applicable in all cases in

which Congress has authorized an award of fees to a 'prevailing party.'" 461 U.S. at 433 n.7.

3. EAJA's textual demand for market-based fees, which makes explicit a policy that is only implicit in section 1988, provides strong confirmation that the two statutes should be treated similarly with regard to the compensability of paralegal services. In 1976, Congress enacted 42 U.S.C. § 1988 to overrule *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), which held that courts in civil rights cases generally did not have the power to award fees to the prevailing party absent statutory authorization. Thereafter, in a series of decisions, the Court made clear that a "reasonable attorney's fee" under section 1988 was one based on how the private market valued legal services, and the standard for the award of attorney fees became one of commercial reasonableness. Thus, in *Hensley*, 461 U.S. at 433, the Court, adopting the primary billing method in commercial law firms, held that the starting point for fee calculation is the product of a reasonable number of hours spent on the litigation and the lawyer's reasonable hourly rate. Similarly, *Blum v. Stenson*, 465 U.S. at 895, held that the "reasonable hourly rate" is to be calculated based on "prevailing market rates in the relevant community." And *Jenkins*, 491 U.S. at 285-87, as discussed above, held that paralegal services, like services performed by lawyers themselves, are compensable on the same basis on which they are charged to paying clients in the relevant legal community.

Under EAJA, however, the courts were not required to construe a general concept such as reasonableness in determining how fees should be calculated. EAJA is

specific on this point, providing that "[t]he amount of fees awarded" "shall be based upon *prevailing market rates* for the kind and quality of the services furnished." 5 U.S.C. § 504(b)(1)(A) (emphasis added); 28 U.S.C. § 2412(d)(2)(A) (same). To be sure, the statutory provisions requiring a market-rate award do not by themselves specify what *types* of services are included in the term "attorney fees," and, thus, do not on their own definitively resolve the question presented here. But they go a long way in that direction. The statutory command that fees be awarded based on "prevailing market rates" is strong evidence of Congress's intent that courts and administrative agencies use a market-based approach when awarding compensation under EAJA. And a market-based approach should, as *Jenkins* explained, provide compensation for paralegal services in the manner dictated by the market. Put another way, if there is any distinction to be drawn between EAJA and section 1988, the Congress that enacted EAJA, and explicitly required use of "prevailing market rates," would have been more, not less, likely to have intended that compensation for paralegal services track the market than the Congress that enacted section 1988 and required only that a fee be "reasonable."

Moreover, in enacting EAJA and its requirement that fees be based on "prevailing market rates," Congress was aware of existing fee-shifting legislation, including section 1988 and fee-shifting provisions of other federal civil rights laws. *See* H.R. Rep. No. 96-1418, at 8 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4987; S. Rep. No. 96-253, 96th, Cong., 1st Sess. 4 (1979). Under those statutes, courts generally awarded fees at

market rates. *See generally Blum*, 465 U.S. at 893-96 (discussing practice under statutes on which section 1988 was patterned). Indeed, under section 1988, in the years leading up to EAJA's enactment, courts that considered whether and on what basis to award fees for paralegal services generally awarded them on a market-rate basis. *See, e.g., Northcross v. Bd. of Educ.*, 611 F.2d 624, 638 (6th Cir. 1979); *Francia v. White*, 594 F.2d 778, 781 (10th Cir. 1979); *Skehan v. Bd. of Trs.*, 501 F. Supp. 1360, 1370, 1374 (M.D. Pa. 1980); *Selzer v. Berkowitz*, 477 F. Supp. 686, 690 & n.3 (E.D.N.Y. 1979).[5] Thus, the legal background against which Congress enacted EAJA in 1980 was one in which the market dictated compensability of attorney fees, *including paralegal services.*

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[5] *Accord, e.g., Keith v. Volpe*, 501 F. Supp. 403, 413-14 (C.D. Cal. 1980); *Coalition to Preserve Houston & Houston Indep. School Dist. v. Interim Bd. of Trs.*, 494 F. Supp. 738, 745, 747 (S.D. Tex. 1980); *Burchett v. Bower*, 470 F. Supp. 1170, 1173 (D. Ariz. 1979); *Mid-Hudson Legal Servs. v. G & U, Inc.*, 465 F. Supp. 261, 274 nn.15-16 (S.D.N.Y. 1978); *Aumiller v. Univ. of Delaware*, 455 F. Supp. 676, 682 & n.13 (D. Del. 1978); *Neely v. City of Grenada*, 77 F.R.D. 484, 487 (N.D. Miss. 1978); *Pennsylvania v. O'Neill*, 431 F. Supp. 700, 711 (E.D. Pa. 1977). In the years prior to EAJA's enactment, courts also awarded fees for paralegal services at market rates under fee-shifting statutes other than section 1988. *See, e.g., Todd Shipyards Corp. v. Dir., Office of Workers' Compensation Programs*, 545 F.2d 1176, 1182 (9th Cir. 1976) (Longshoremen's and Harbor Workers' Compensation Act); *Swicker v. William Armstrong & Sons, Inc.*, 484 F. Supp. 762, 773 (E.D. Pa. 1980) (Title VII); *Sherrill v. J.P. Stevens & Co., Inc.*, 441 F. Supp. 846, 848-49 (W.D.N.C. 1977) (same); *see also In re Chicken Antitrust Litig.*, 560 F. Supp. 963, 972, 977-78 (N.D. Ga. 1980) (federal antitrust settlement).

4. The Court's decision in *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83 (1991), strongly supports the view that paralegal services are a part of "attorney fees" under EAJA and, thus, compensable at market rates. First, *Casey* makes clear that *Jenkins* was not, as the Federal Circuit suggested, motivated by an extratextual policy concern that if paralegal services were not shoehorned into "attorney's fees," there would be no basis under 42 U.S.C. § 1988 for recovering them at all because section 1988 does not refer to "expenses." *See* Pet. App. 15a. To the contrary, in holding that expert witness fees were not compensable "attorney's fees" under section 1988, *Casey* rejected the plaintiff's assertion that *Jenkins* was an instance where the Court "permit[ted the] ... perception of the 'policy' of the statute to overcome its 'plain language.'" *Casey*, 499 U.S. at 99. The Court explained that *Jenkins* was not a freewheeling exposition of section 1988's policy, but a straightforward interpretation of the term "attorney's fees," which, the Court held, included law clerk and paralegal services because they "had traditionally been included in calculation of the lawyers' hourly rates." *Id.* As explained in detail above, that textual reading of the term "attorney's fees" in section 1988 is equally, if not more, applicable to EAJA.

Second, *Casey* explained that a number of fee-shifting statutes expressly authorize an award of both attorney's fees and expert's fees, thus undermining the claim that section 1988's reference to "attorney's fees" alone authorized an award of expert fees. The Court contrasted that situation with the paralegal services question decided in *Jenkins* on the ground that fee-

shifting statutes do *not* single-out paralegal services for special treatment, and it took pains to point out that EAJA is no exception:

> We do not know of a single statute that shifts clerk or paralegal fees separately; and even those, *such as the EAJA*, which comprehensively define the assessable "litigation costs" make no separate mention of clerks or paralegals.

Id. at 99-100 (emphasis added). Thus, *Casey* underscores that paralegal services are a part of "attorney fees" compensable at "prevailing market rates" under EAJA because, just like other fee-shifting statutes, EAJA "make[s] no separate mention of clerks or paralegals." *Id.*[6]

5. The Federal Circuit shunned the follow-the-market approach endorsed in *Jenkins* and in EAJA's plain text based in part on a Senate committee report that cited as an example of an "expense" paralegal time "billed at cost." *See* Pet. App. 19a (quoting S. Rep. No. 98-586, 98th Cong., 2d Sess. 15 (1984)). That reliance was misplaced for several reasons.

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[6]The Federal Circuit majority acknowledged that, in *Casey*, the Court "reaffirmed its holding in *Jenkins* that paralegal services are included in § 1988's definition of attorney's fees." Pet. App. 11a. The majority quoted virtually all of the *Casey* opinion immediately before and after the blocked quotation reproduced above, *see id.*, but omitted the part most relevant to this case: the sentence that identified EAJA as a statute that, like other fee-shifting statutes, makes no separate mention of paralegal services and thus incorporates those services within the term "attorney fees."

First, contrary to the Federal Circuit's understanding of EAJA, the report's reference to paralegal services as an "expense" tells us nothing about whether those services should be valued at market rate or at the attorney's cost, since all items compensable under EAJA, including attorney fees, are "expenses." *See infra* at 36-38 (discussing the Federal Circuit's misreading of EAJA in this regard). And the report's reference to paralegal time "billed at cost" reflects only that if paralegal time is billed at cost in the marketplace, it should be compensated under EAJA on that basis. *See Jenkins*, 491 U.S. at 288 ("Nothing in § 1988 requires that the work of paralegals invariably be billed separately. If it is the practice in the relevant market not to do so, or to bill the work of paralegals only at cost, that is all that § 1988 requires."). But if paralegal time is billed on an above-cost hourly basis, then the market should control there as well. The Senate report does not address that scenario or purport to preclude that result.[7]

Moreover, the Federal Circuit relied on the committee report selectively. Shortly before the line quoted by the Federal Circuit, the report relied on an interpretation of EAJA issued by the Administrative Conference of the United States (ACUS) that would "permit the award of 'reasonable expenses of the

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[7]In addition, the Federal Circuit assumed that the committee report's reference to an expense award "at cost" meant the *attorney's* cost rather than the *client's* cost. That assumption is not correct because EAJA provides reimbursement for the expenses incurred by the "prevailing party," not the prevailing party's lawyer. *See infra* Part C.

attorney ... as a separate item, if the attorney ... *ordinarily charges clients for such expenses.*'" S. Rep. No. 98-586, at 14 (quoting ACUS interpretation) (emphasis added). The committee thus endorsed ACUS's position that the market should control the determination of what *types* of services are separately compensable under EAJA. Given that market-based approach, it is unlikely that the same committee believed that the market should be disregarded in *valuing* any of those services, including paralegal services. Indeed, immediately after its reference to ACUS's views, the committee report cited with approval the Sixth Circuit's decision in *Northcross v. Board of Education,* a section 1988 case that took a market-based approach to the award of fees and expenses generally and held that attorney fees for *paralegal services* should be awarded *at market rates. See* 611 F.2d at 638. In sum, the committee report taken as a whole bolsters Richlin's view that, under EAJA, paralegal services should be compensated as the market compensates them. In any case, the report hardly provides unambiguous support for the Federal Circuit's ruling.

Finally, the Federal Circuit majority's reliance on the committee report fails for a more fundamental reason: The report is not "legislative history" at all. The Senate report was prepared for a 1984 version of EAJA passed by the 98th Congress but vetoed by the President. *See* H.R. Rep. No. 99-120, pt. 1, at 6 (1985), *reprinted in* 1985 U.S.C.C.A.N. 132, 134. Thus, the court of appeals erred in its original opinion in stating that "Congress acted to make EAJA permanent in 1984." Pet. App. 19a. In fact, as that court later

acknowledged in its supplemental opinion, *id.* at 56a n.2, EAJA was made permanent not by the *98th* Congress in 1984, but by the *99th* Congress in 1985, and "[n]o Senate Report was submitted with th[at] legislation." 1985 U.S.C.C.A.N. 132. The House committee report that accompanied the bill that was actually enacted in 1985 makes no mention of the treatment of paralegal services. *See id.* at 132-57.

To the extent that legislative history serves as legitimate evidence of congressional intent, it does so only because it is presumed to have been ratified by Congress and the President when the relevant legislation was enacted. *See* Jonathan R. Siegel, *The Use of Legislative History in a System of Separated Powers*, 53 Vand. L. Rev. 1457, 1522 (2000); *cf. Sullivan v. Finkelstein*, 496 U.S. 617, 631-32 (1990) (Scalia, J., concurring). That did not occur with respect to the 1984 report cited by the Federal Circuit. That court's assertion that the Senate report is "pertinent" nonetheless because the President's veto reflected concern about a topic other than paralegal services and the enacted 1985 legislation was otherwise "nearly identical" to the failed 1984 legislation, *see* Pet. App. 56a n.2, sidesteps the problem: The Federal Circuit's defense of the 1984 report does not attempt to explain how a committee report produced to accompany legislation voted on by one Congress could have been ratified by *another* Congress that did not produce that report, did not enact the legislation accompanying that report, and never referred to the relevant issue in its own legislative history.

In its opposition to certiorari, the government claimed reliance on the 1984 committee report was

justified even though it accompanied vetoed legislation because this Court endorsed that kind of reliance in a footnote in *United States v. Enmons*, 410 U.S. 396, 404 n.14 (1973). *See* Cert. Opp. 8 n.4. If anything, the *Enmons* footnote underscores that the 1984 report is not a legitimate basis for giving meaning to the 1985 legislation. Over a four-justice dissent, the footnote permitted reliance on floor statements accompanying unenacted legislation only because those statements were repeatedly endorsed in the legislative history accompanying the legislation that was actually enacted. As explained above, the legislative history that accompanied the enacted version of EAJA did not mention paralegal services, let alone endorse the snippet of faux legislative history on which the Federal Circuit relied.

* * *

For all of the reasons addressed above, paralegal services are "attorney fees" that must be awarded at "prevailing market rates" under EAJA.

B. EAJA's Adjustable Rate Cap Provides No Basis For Compensating Paralegal Services At Cost.

As explained above, our view that paralegal services are compensable under EAJA at market rates comports with *Jenkins* and EAJA's text, structure, and purpose. Moreover, as this Court put it in *Jenkins*, "encouraging the use of lower cost paralegals rather than attorneys wherever possible, ... 'encourages cost-effective delivery of legal services.'" 491 U.S. at 288 (quoting *Cameo*, 738 F.2d at 846); Pet. App. 23a (relying on market forces "encourages cost-effective delivery of legal services.") (Plager, J., dissenting); *see*

also Miller v. Alamo, 983 F.2d 856, 862 (8th Cir. 1993) ("Work done by paralegals is compensable if it is work that would have been done by an attorney. If such hours were not compensable, then attorneys may be compelled to perform the duties that could otherwise be fulfilled by paralegals, thereby increasing the overall cost of legal services."); *Jean*, 863 F.2d at 778 (same).[8]

The Federal Circuit, however, maintained that this rationale does not apply here in light of EAJA's adjustable cap on hourly rates. Pet. App. 18a. In its view, if paralegal services were compensable at market rates, there would be an undue incentive to use paralegal services (recovery for which would be largely or entirely uncapped), rather than lawyer services (recovery for which would be limited by the fee cap). *See id.* Thus, the Federal Circuit maintained, paralegals would be "overused," inducing "less efficient performance of legal services." *Id.* This argument is insufficient to overcome *Jenkins*, EAJA's text, and the

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[8]The efficiency rationale for use of paralegals was well understood at the time of EAJA's enactment. *See, e.g., Todd Shipyards*, 545 F.2d at 1182 ("Paralegals can do some of the work that the attorney would have to do anyway and can do it at substantially less cost per hour, resulting in less total cost billed to the employer [client]. Therefore, paralegal time at paralegal rates can reasonably be counted along with the attorney's time as 'attorney fees.'"); *In re Chicken*, 560 F. Supp. at 977 ("The advent and widespread use of the paraprofessional has meant that the cost of effective legal counsel has been reduced and its availability enhanced without impairing the quality or delivery of legal services."); *Mid-Hudson*, 465 F. Supp. at 274 n.16 ("The use of paralegals saves lawyer's time and consequently money. It should be encouraged, not the reverse.").

other evidence of congressional intent discussed in Part A above. Moreover, for the reasons that follow, the argument fails on its own terms.

1. The Federal Circuit's position appears to be based on that court's mistaken belief that, as a general proposition, Congress sought in EAJA to compensate parties for their litigation expenses on a below-market-rate basis. Pet. App. 16a-17a ("It seems unlikely that Congress would have set the fee for paralegals as high as $75 per hour ... [,] given the overall desire to cap allowable fees below market rates."). The Federal Circuit erred because it looked at EAJA from today's perspective — where lawyers' hourly rates at large commercial law firms in major metropolitan areas are generally above the EAJA cap — not from the vantage point of EAJA's original enactment in 1980 or its reenactment in 1985. As this Court has put it, however, "[t]o interpret accurately" Congress's intent, a court should not read statutes "as if they were written today, for to do so would inevitably distort their intended meaning." *Goldstein v. California*, 412 U.S. 546, 564 (1973).

EAJA was not conceived as a statute under which most legal work performed by most lawyers would be compensable at below-market rates. To the contrary, EAJA was conceived as a market-rate statute, as its text expressly indicates, albeit one under which some of the costs of legal services were capped (unless the statutory criteria for lifting the cap were met). In 1980, the circumstances in which the hourly-rate ceiling would be below a lawyer's reasonable hourly market were relatively rare. Indeed, in the years leading up to EAJA's enactment, lawyers' market rates were often

below $75 per hour, sometimes well below.[9] Generally, fee rates exceeded $75 per hour only for relatively senior lawyers in large metropolitan law firms.[10] Indeed, even in the period between EAJA's initial enactment in 1980 and its reenactment in 1985, the unadjusted $75 per hour rate cap proved sufficient to

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[9] *See, e.g., Francia*, 594 F.2d at 781 ($32 per hour "and up"); *Skehan*, 501 F. Supp. at 1368-69 ($50-$70 per hour for seven attorneys in practice in Washington, D.C., and $80 per hour for one attorney who graduated law school in 1957 and had practiced for seven years at the Office of the Solicitor General); *Swicker*, 484 F. Supp. at 772-73 (1980 decision citing and discussing wide range of cases in which hourly rates almost invariably were below $75 per hour, referring to 1977 study finding that "mean hourly rate awarded in Title VII cases was $40," and awarding fees of $60 per hour for work of two attorneys and $40 per hour for another); *Kennedy v. Crittendon*, 1980 WL 243, *4 (M.D. Ga. 1980) ($30 to $60 per hour); *Brady v. Washington County*, 509 F. Supp. 538, 543 (E.D. Tenn. 1979) (plaintiff's witness testified in fee proceeding "that the customary charge for legal services in civil matters in the area . . . is $50-an-hour."); *Mid-Hudson*, 465 F. Supp. at 270 (awards ranging from $50 to $80 per hour); *Aumiller*, 455 F. Supp. at 682 ($25 to $75 per hour); *McPherson v. School Dist. No. 186*, 465 F. Supp. 749, 760 (S.D. Ill. 1978) (awarding $25 to $60 per hour and noting that the "current average hourly rate in Springfield for complex federal litigation is $50 per hour for experienced attorneys comparable in ability to" the senior lawyer in the case); *Neely*, 77 F.R.D. at 486 ("prevailing hourly rate" of $35 to $45 per hour).

[10] *See, e.g., Coalition to Preserve Houston*, 494 F. Supp. at 747 ($30 to $75 per hour for three attorneys and $85 to $100 per hour for the senior lawyer); *Selzer*, 477 F. Supp. at 688, 690-91 (court awarded "normal billing rates of approximately $125 per hour for partners' time and between $27.25 to $65 per hour for associates' time" at major New York law firm, noting that fee resulted in an average rate of about $60 per hour).

replicate the market for most or all legal work in most cases.[11]

This point is driven home by the model rules issued by the Administrative Conference of the United States shortly after EAJA's reenactment in 1985. The rules provided that, in determining the compensable market rate, the adjudicator should consider various factors, including the customary fees for similar services and prevailing market rates in the community. 51 Fed. Reg. 16659, 16666 (May 6, 1986). This guidance would have had little value if market rates for legal services were generally expected to exceed the statutory fee cap.

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[11] *See, e.g., Groves v. Heckler*, 599 F. Supp. 830, 834 (M.D. Pa. 1984) ($65 per hour); *Citizens for Responsible Resource Dev. v. Watt*, 579 F. Supp. 431, 449 (D. Ala. 1983) ($70 per hour); *Cable Atlanta, Inc. v. Project, Inc.*, 572 F. Supp. 1113, 1116 (N.D. Ga. 1983) ($60 per hour for one lawyer and $75 per hour for another); *Wallace v. Sec'y of HHS*, 1983 WL 44228, *2 (D. Mass. 1983) ($35 to $60 per hour); *Chee v. Schweiker*, 563 F. Supp. 1362, 1365 (D. Ariz. 1983) ("$50 per hour is a reasonable rate in plaintiff's local area for the type of legal services rendered in this case."); *Kauffman v. Schweiker*, 559 F. Supp. 372, 377 (M.D. Pa. 1983) ($50 per hour); *J.A. Jones Constr. Co. v. Southern Stress Wire Corp.*, 575 F. Supp. 365, 370 (N.D. Ga. 1982) ($60 to $65 per hour for one lawyer and $70 to $75 per hour for another); *Envtl. Defense Fund, Inc. v. Watt*, 554 F. Supp. 36, 42 (E.D.N.Y. 1982) ("The hourly rates requested for each individual appear to be based on prevailing market rates and are at or within the 75 dollar-per-hour limit established by" EAJA.); *Moholland v. Schweiker*, 546 F. Supp. 383, 387 (D.N.H. 1982) ($30 to $50 per hour); *Visser v. Magnarelli*, 542 F. Supp. 1331, 1338 (N.D.N.Y. 1982) (awarding $75 per hour because "it represents the hourly rate in this area normally charged for similar work by attorneys of like skill"); *WATCH v. Harris*, 535 F. Supp. 9, 15-16 (D. Conn. 1981) (awarding fees at $45 to $50 per hour).

We do not intend to suggest that the fee cap in 1980 or 1985 was at or above the prevailing market rates for all lawyers in all markets; as noted earlier, it was not. Rather, our point is only that EAJA was seen primarily as a market-rate-based fee-shifting statute that would, with its potential to adjust rates for increases in the cost of living, provide market-rate compensation for most, albeit not all, compensable legal work. EAJA's drafters could not have foreseen that inflation in legal services would greatly outstrip inflation generally. They would thus have had no reason to believe that the EAJA fee cap would, as a general matter, promote the "overuse" of legal personnel billed at relatively low rates.

2. Even if we were to assume (incorrectly) that EAJA's drafters contemplated a world in which market rates for lawyers generally exceeded EAJA's cap, the Federal Circuit's concern about the fee cap would still be misguided. That concern was necessarily premised on the unstated proposition that EAJA will motivate law firms to shunt work to paralegals incapable of handling that work. But that proposition is implausible because of the strong ethical and economic incentives not to assign work in that manner. The requirement that lawyers provide competent and zealous representation would generally prohibit a lawyer from demanding that a paralegal, say, write an appellate brief, just as law firm partners generally cannot assign the most complex and sensitive matters to a brand-new lawyer, even if doing so would save clients money in the short term. Nor would the market permit such inappropriate use of paralegals. If a law firm were to overuse paralegals in the manner contemplated by the

Federal Circuit, the client would not save in the end, because the quality of legal services would suffer, and the client would demand the proper use of law firm personnel or take its business elsewhere. And, on the other hand, if the EAJA rate cap induces law firms to provide paralegals with additional work that they *are* capable of handling, the client will save money, and *Jenkins*'s efficiency rationale will be served in spades.

In addition, consider what would happen if the Federal Circuit's rule controlled. In cases subject to EAJA, paralegal services would be recoverable only at the cost of those services to law firms — and clients would lose. In cases where fees were recoverable — that is, where the client had prevailed and the government's position was held to be unreasonable — EAJA would reimburse only the law firm's cost in employing the paralegal, even though the client would have incurred fees at full market rate. That result would run counter to a central purpose of EAJA: "to eliminate for the average person the financial disincentive to challenge unreasonable governmental actions." *Jean*, 496 U.S. at 163.

3. In any event, the Federal Circuit's concern about the supposed overuse of paralegals proves far too much. The Federal Circuit's concern, though misguided, is, to be sure, premised on a basic truth about the fee cap: EAJA provides less reimbursement, as a percentage of the total fee incurred by the client, the more the law firm uses higher-priced personnel whose market rates exceed the fee cap. As noted, the Federal Circuit claimed that if fees for paralegal services are recoverable at market rates, law firms will assign work to relatively low-priced paralegals whose

market-rate fees are likely to be fully recoverable because they generally fall below the fee cap.

As explained earlier (at 30-33), in EAJA's early years, even in relatively rare instances where some attorney rates in some locations exceeded the cap, the rates of junior and mid-level lawyers did not, and, thus, fees for their work were fully recoverable even if fees for the work of their senior colleagues were not. Today, however, largely because inflation in legal services has outstripped increases in the cost of living generally, the market rates for relatively junior associates as well as their more senior colleagues often exceed even the inflation-adjusted EAJA cap. But even when that occurs, the rates for junior associates and senior partners frequently differ dramatically. *See, e.g., Gautreaux v. Chicago Hous. Auth.*, 491 F.3d 649, 660 (7th Cir. 2007) (rates ranging from $200 to $400 per hour); *Hixon v. City of Golden Valley*, 2007 WL 4373111 (D. Minn. 2007) (same); Laffey Matrix, available at http://www.usdoj.gov/usao/dc/Divisions/Civil_Division/Laffey_Matrix_7.html (District of Columbia fee rates ranging from $215 per hour for lawyers with one to three years of experience to $425 per hour for lawyers with more than 20 years of experience).[12] Thus, if the Federal Circuit were correct about the effect of the rate cap, in cases subject to

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[12]The Laffey matrix serves as a benchmark for market-rate fee shifting in federal litigation in the Washington, D.C. area and is updated annually by the office of the U.S. Attorney for the District of Columbia. It has its origins in *Laffey v. Northwest Airlines, Inc.*, 572 F. Supp. 354, 388 (D.D.C. 1983), *aff'd in part, rev'd in part on other grounds*, 746 F.2d 4 (D.C. Cir. 1984).

EAJA, *junior lawyers* would be "overused" and inefficiency supposedly would ensue. But no one would suggest that the work of junior associates is not compensable as "attorney fees" under EAJA and that such work may only be reimbursed at the associates' cost to their law firms.

To be sure, junior associates are lawyers and paralegals are not. But the fact that junior lawyers, just as surely as paralegals, would be "overused" under the Federal Circuit's view of EAJA demonstrates that it is recent hyper-inflation in the market for legal services generally, and nothing about the cost of paralegal services in particular or the meaning of the statutory term "attorney fees," that is the true source of the Federal Circuit's concern.

* * *

For all of these reasons, EAJA's fee cap is irrelevant to the question presented and provides no basis for ignoring *Jenkins* and EAJA's requirement that attorney fees be awarded at "prevailing market rates."

C. Paralegal Services Are Not "Other Expenses" Under EAJA, But Even If They Are, They Should Be Awarded At The Cost To The Client Not The Cost To The Lawyer.

1. The question in this case is whether paralegal services are compensable under EAJA at market rates or at the cost of those services to the lawyer, as the government maintains. In taking the latter approach, the Federal Circuit focused on the fact that EAJA authorizes an award of "expenses," claiming in particular that EAJA draws a distinction between "attorney fees," billed at market rates, and "expenses,"

billed at cost. *See, e.g.*, Pet. App. 19a ("[W]e hold that paralegal services are not recoverable as fees, but are only recoverable as expenses at the cost to the attorney."); *id.* at 55a-56a ("[P]ayments for paralegal services under EAJA are not recoverable as 'attorney's fees' but are recoverable as 'expenses,' allowable only at cost."). With that supposed statutory distinction in mind, the court of appeals distinguished *Jenkins* on the ground that, in contrast to EAJA's reference to "expenses," section 1988 refers only to "attorney's fees" and does not mention "expenses." *See id.* at 15a.

The Federal Circuit seriously misread EAJA's plain text. EAJA authorizes an award of "fees and *other* expenses." 5 U.S.C. § 504(a)(1) (emphasis added); *see also* 28 U.S.C. § 2412(d)(1)(A) (same). "Fees and other expenses" are defined to include "reasonable attorney ... fees," the amount of which "shall be based upon prevailing market rates for the kind and quality of services furnished ...." 5 U.S.C. § 504(b)(1)(A); *see also* 28 U.S.C. § 2412(d)(2)(A) (same). Thus, *all* awards under EAJA are awards of "expenses," including awards of "attorney fees." The Federal Circuit's dichotomy between "expenses" awarded at cost, on the one hand, and "attorney fees" awarded at market rate, on the other, is flatly at odds with the statute.

Put another way, the term "expenses" cannot, as the Federal Circuit contemplated, mean only those items awardable at cost because that term includes fees, which are awardable at market rates. *Cf. Marek*, 473 U.S. at 9 (because section 1988 authorizes award of "attorney's fees *as part of* the costs," such fees are "costs" under that section and Federal Rule of Civil Procedure 68). For that reason, the Federal Circuit's

reliance on the presence in EAJA of the term "expenses" begs the questions — already answered in *Jenkins* — whether the statutory term "attorney fees" includes paralegal services, and whether fees for such services may be awarded at market rates. (And as previously discussed, under EAJA, once it is determined that paralegal services are a component of "attorney fees," further reliance on *Jenkins* is unnecessary because the statute says that "fees" are to be awarded at "prevailing market rates.")[13]

2. The government apparently has recognized the flaw in the Federal Circuit's reasoning and now says that the question presented is whether paralegal services are compensable at market rate as fees, or as "'other expenses' compensable at the rate of cost to the attorney." Cert. Opp. (I). But that new parsing of the statute does not help the government. "Other expenses" under EAJA generally refers to out-of-pocket expenses for services provided by third parties outside of the law firm. Those out-of-pocket expenses can either be paid directly by the client or incurred in the first instance by the lawyer on the client's behalf.

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[13]Moreover, the Federal Circuit's reliance on the absence of an express provision for the award of out-of-pocket "expenses" under section 1988 as a basis for distinguishing *Jenkins* overlooks that section 1988 has long been read to authorize recovery of out-of-pocket expenses. *See, e.g., Casey*, 499 U.S. at 87 n.3 (noting that courts have held that "'reasonable out-of-pocket expenses incurred by the attorney' [are] included in § 1988 'attorney's fee' award") (quoting *Northcross*, 611 F.2d at 639); *Trs. of the Constr. Indus. & Laborers Health & Welfare Trust v. Redland Ins. Co.*, 460 F.3d 1253, 1257 (9th Cir. 2006); *Dowdell v. City of Apopka, Fla.*, 698 F.2d 1181, 1190-91 (11th Cir. 1983).

Thus, courts have regularly approved reimbursement for "other expenses," such as transportation and other travel costs, postage, long distance telephone calls, and the like paid by the client or the law firm to outside vendors to accomplish the client's objectives in the litigation.[14] In these situations, to be sure, if the lawyer pays the bill to the outside vendor, reimbursement is limited to the lawyer's cost, but only because such reimbursement is also the cost to the *client*. Thus, these "other expenses" are in reality charged at market rates — that is, at the rate that the client is willing to pay for them in the relevant market, whether that is the amount that the phone company charges for long distance calls made on the client's behalf or that an airline charges for a flight taking the lawyer to court. And, that is why, in deciding whether "other expenses" are compensable under EAJA, the courts have generally taken a follow-the-market approach and allowed reimbursement of such expenses when they are ordinarily billed separately to the client in the relevant legal market rather than included in the attorney's overhead. *See, e.g., Int'l Woodworkers*, 792 F.2d at 767; *Adkinson*, 256 F.Supp.2d at 1319.

Awarding expenses at the lawyer's cost — when it is different from the client's cost — runs headlong into this market-based approach to expense recovery and is

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[14] *See, e.g., Kelly v. Bowen*, 862 F.2d 1333, 1335 (8th Cir. 1988); *Int'l Woodworkers of Am. v. Donovan*, 792 F.2d 762,767 (9th Cir. 1985); *Jean*, 863 F.2d at 778; *United States v. Adkinson*, 256 F. Supp. 2d 1297,1319 (N.D. Fla. 2003), *aff'd*, 360 F.3d 1257 (11th Cir. 2004).

an irrational basis for reimbursing a party under a fee-shifting statute. By definition, clients incur paralegal expenses at market rates. The Federal Circuit, however, decided that those services should only be reimbursed at their lawyers' cost. But that was no better than plucking a number out of the air. The cost to the lawyer might be a third, or half, or two-thirds of what the party actually incurred for the paralegal's time, and thus has no relation to the market rate or any other sensible guidepost for the *client's* expense recovery.

Paralegal services are not generally purchased from third-party vendors, but are performed by in-house law firm personnel under the direction of attorneys, which is one reason why it makes sense to view paralegal services as a component of statutory "attorney fees." *See Jenkins*, 491 U.S. at 285 (holding that term "attorney's fees" was meant to compensate work of all personnel "whose labor contributes to the work product for which an attorney bills her client."). But, for the reasons stated above, if the Court rejects our position that paralegal services are a component of EAJA "attorney fees," and agrees with the government that paralegal services are "other expenses," those services should be reimbursed at the *client's* cost, not at the *lawyer's* cost. After all, EAJA authorizes an award of fees and other expenses "to the prevailing *party*," 5 U.S.C. § 504(a)(1); 28 U.S.C. § 2412(d)(1)(A), not that party's lawyer, and so if paralegal services are to be awarded at cost, that cost should be the party's.

3. The irrationality of the Federal Circuit's decision to award paralegal expenses at the lawyer's cost is underscored by the practical problems it will cause

(and has already caused). As noted earlier, the award to Richlin for paralegal services was based on the Board of Contract Appeals' informal Internet survey of paralegal salaries. But that is not the proper way to assess "the attorney's cost." Pet. App. 19a. The attorney's cost for a paralegal would include not only the paralegal's salary, but the cost of employer-provided fringe benefits and a share of all overhead allocable to the paralegal, including utilities, rent or depreciation, and similar administrative costs. The cost computation would be difficult, and it would differ paralegal to paralegal, firm to firm, and, arguably, season to season. Disputes would arise as to whether this or that cost were properly included in overhead.

These problems are not theoretical. The difficulties of properly assessing the cost to the attorney may be insurmountable, as illustrated by two EAJA cases decided in the wake of the decision below. In *Former Employees of BMC Software, Inc. v. Sec'y of Labor*, ___ F. Supp. 2d ___, 2007 WL 2994605 (C.I.T. 2007), the court noted that "[c]alculating the amount of the award for the paralegal-type work in this case is particularly difficult in light of ... *Richlin* ...." *Id.* at *38. It explained that although "[p]rior to *Richlin*, EAJA awards had included compensation for paralegal work at market rates ..., [now they] are only recoverable as expenses *at the cost to the attorney*." *Id.* (emphasis in original, internal quotation omitted). Because it was "impossible to calculate the [paralegal] fee award in this case" based on the prevailing party's fee application that had been filed prior to the decision below, the applicant was "accorded the opportunity to provide information on the cost to the law firm of any

paralegals and other non-attorneys whose time is reflected in the [fee] Application." *Id.*

But proving actual cost turned out to be too difficult, and "[r]ather than attempt to separately determine the actual cost to the firm for the" paralegals, the prevailing party had to settle for less – the hourly rate that the Federal Circuit had allowed to Richlin, based on paralegal salaries alone. *Former Employees of BMC Software, Inc. v. Sec'y of Labor*, 2007 WL 4181696, *3 (C.I.T. 2007). That result had the virtue of simplicity, but not common sense: The award for paralegal services lacked any connection either to what the party had incurred for paralegal services or to an accurate assessment of the attorney's cost.

Even worse, in *Information Sciences Corp. v. United States*, 78 Fed. Cl. 673, 683 (Fed. Cl. 2007), "[i]n light of the level of proof demanded by *Richlin*," the prevailing plaintiff "withdr[ew] a claim for recovery of paralegal fees," thereby relinquishing $15,875 that it had incurred for paralegal services in opposing unreasonable government conduct — fees to which it would have been entitled had the court based its award on market rates.

* * *

There is a mechanism that avoids the complexity and irrationality of compensating paralegal services at the lawyer's cost. It is called a market, which silently and definitively values legal services. It avoids both the arbitrary loss of deserved compensation, as has occurred as a result of the decision below, and the "second major litigation," *Hensley*, 461 U.S. at 437, that would ensue if litigants were required to ascertain

the value of legal services based on the artificial criterion of the lawyer's cost. It is also the mechanism chosen by Congress when it decided that attorney fees under EAJA should be valued at "prevailing market rates." 5 U.S.C. § 504(b)(1)(A); 28 U.S.C. § 2412(d)(2)(A).

CONCLUSION

The decision below should be reversed and the case remanded for the purpose of setting an award of attorney fees for paralegal services at market rates.

Respectfully submitted,

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ADDENDUM

28 U.S.C. § 2412

(d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

* * *

(2) For the purposes of this subsection–

(A) "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees (The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the United States; and (ii) attorney fees shall not be awarded in excess of $125 per hour unless the court determines

that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.)

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No. 06-1717

In the Supreme Court of the United States

RICHLIN SECURITY SERVICE COMPANY, PETITIONER

v.

MICHAEL CHERTOFF, SECRETARY OF HOMELAND SECURITY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether, under the Equal Access to Justice Act, 5 U.S.C. 504 and 28 U.S.C. 2412, paralegal services are "attorney fees" compensable at market rates or "other expenses" compensable at the rate of cost to the attorney.

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In the Supreme Court of the United States

No. 06-1717

RICHLIN SECURITY SERVICE COMPANY, PETITIONER

v.

MICHAEL CHERTOFF, SECRETARY OF HOMELAND SECURITY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT

STATEMENT

1. Petitioner contracted with the Immigration and Naturalization Service in 1990 and 1991 to provide guard services for detainees at the Los Angeles International Airport. Pet. App. 2a. In 1995, the Department of Labor determined that the contracts had misclassified petitioner's employees for purposes of the wage classification scheme of the Service Contract Act of 1965, 41 U.S.C. 351 *et seq.*, resulting in underpayment of petitioner's employees. Pet. App. 2a-3a. The Department of Labor further found that employees were entitled to back wages from petitioner. *Ibid.* Petitioner then filed a claim against the government for the increased costs associated with the parties' misclassification of petitioner's employees and, after its claim was denied, pur-

sued an administrative appeal to the Department of Transportation Board of Contract Appeals (Board) without representation by legal counsel. *Id.* at 26a, 32a.

After the Board determined that petitioner was entitled to compensation from the government, petitioner retained legal counsel in 1998 to represent petitioner before the Board in further proceedings to quantify the amount of compensation owed. Pet. App. 27a, 33a-34a. A series of appeals to the Board and to the Federal Circuit ensued. Petitioner ultimately secured partial success on its $1.57 million claim when the Board awarded petitioner approximately $700,000 in compensation. *Id.* at 3a, 26a, 44a. The court of appeals affirmed. *Id.* at 3a.

2. In 2003, petitioner applied to the Board under the Equal Access to Justice Act (EAJA or Act), 5 U.S.C. 504, for an award of attorney fees and other expenses. Pet. App. 29a. The EAJA authorizes an agency to award "fees and other expenses" to a "prevailing party" in adversary administrative proceedings in cases in which the position of the United States is not "substantially justified" and no special circumstances would make an award unjust. 5 U.S.C. 504(a)(1).[1]

The statute defines "fees and other expenses" to include "the reasonable cost of any study, analysis, engineering report, test, or project which is found by the agency to be necessary for the preparation of the party's case" as well as "reasonable expenses of expert witnesses" and "reasonable attorney or agent fees." 5 U.S.C. 504(b)(1)(A). The statute further provides:

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[1] A separate provision of the EAJA provides for recovery of "fees and other expenses" from the United States by a prevailing party in a civil action in court. 28 U.S.C. 2412(d)(1)(A); see also 28 U.S.C. 2412(d)(2)(A) (defining "fees and other expenses"). Section 2412 is not at issue in this case.

> The amount of fees awarded under this section shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the agency involved, and (ii) attorney or agent fees shall not be awarded in excess of $125 per hour unless the agency determines by regulation that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents for the proceedings involved, justifies a higher fee.

Ibid. Because the Department of Transportation (like most agencies) has not promulgated regulations authorizing the Board to increase the statute's $125-per-hour ceiling on "attorney or agent fees," reimbursement for such fees by the Board is limited to $125 per hour.

Petitioner's EAJA application, as amended, sought reimbursement for $51,794 in attorney fees for work on the underlying proceedings before the Board and $14,225 in attorney fees for time spent preparing petitioner's EAJA application based on the statute's maximum rate of $125 per hour. Pet. App. 5a, 29a; cf. C.A. App. 30, 91, 169 (listing hourly rate of petitioner's primary counsel as $325 to $400 per hour). Petitioner additionally sought reimbursement for paralegals used by petitioner's attorney. The amended EAJA application sought reimbursement at an $80 hourly paralegal rate beginning in 1998, which increased to $95 in 2002 and $135 in 2004. *Id.* at 41, 156, 211; cf. Pet. App. 33a (amended application eliminated EAJA claim for work before June 1998). Petitioner thus sought reimbursement, generally at these rates, for 523.8 hours of para-

legal time on the underlying cases and 68.2 hours of paralegal time preparing the EAJA application, totaling $51,901 in paralegal charges. *Id.* at 5a.[2]

3. The Board awarded petitioner $43,312 in attorney fees for the underlying cases and $7,125 in fees for the preparation of the EAJA petition. Pet. App. 47a, 52a. With regard to reimbursement for paralegal expenses, the Board ruled that, under the EAJA, such expenses are recoverable at the cost to the firm, not at the rate billed to the client. Finding no evidence in the record concerning the cost of paralegal services to the firm,[3] the Board, rather than denying paralegal expenses entirely, took judicial notice of paralegal salaries in the Washington, D.C. area and found that $35 per hour was a reasonable cost to petitioner's Washington-based firm.

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[2] As the court of appeals noted, it appears that petitioner reduced its fee request to $95 per hour for periods in which petitioner's EAJA application asserted a $135 hourly rate. Pet. App. 5a; see Reply to Respondent's Answer to Richlin's Am. Application for Attorney's Fees & Expenses 5 (stating that petitioner "reduced any of its paralegal costs claimed in excess of $95 per hour to $95 per hour").

[3] Petitioner similarly did not submit affidavits or other evidence that its requested rates were consistent with prevailing charges in the relevant legal market. The time records submitted by petitioner were generated in connection with petitioner's EAJA claim (and not submitted as contemporaneous bills to petitioner), see Appellant's Application for Attorney's Fees & Expenses 20, and, while petitioner asserted in a legal brief that $400 (for counsel) and $135 (for paralegals) reflected "market rates" because its counsel uses these hourly rates and "[c]lients pay * * * without objection," Reply to Respondent's Answer to Richlin's Am. Application for Attorney's Fees & Expenses 4, the Board found that petitioner failed to prove that its requested paralegal rate reflected a prevailing market rate. Pet. App. 42a n.4; cf. *Blum* v. *Stenson*, 465 U.S. 886, 896 n.11 (1984). The court of appeals had no occasion to revisit that aspect of the Board's ruling.

Id. at 42a-43a. The Board accordingly awarded petitioner $10,587 for paralegal expenses. *Id.* at 52a.

4. The court of appeals affirmed. Pet. App. 1a-24a. Relying on the text, structure, purpose, and history of the EAJA, the court of appeals ruled that paralegal costs are not compensable as "fees," but rather constitute other "expenses" that are recoverable only at the cost to the attorney. *Id.* at 7a-19a.

In particular, the court explained that the EAJA allows for the recovery of "expenses" beyond just "fees," but allows the recovery of such expenses only to the extent of their underlying cost. Given that additional category and, in light of the strict construction that must be given to the EAJA's limited waiver of sovereign immunity, the court determined that Congress intended paralegal costs to be recoverable as "expenses" reimbursed at cost to the attorney, and not "fees." Pet. App. 6a, 15a. That construction, the court explained, was bolstered by the fact that Congress had gone out of its way to place a cap on attorney fees, but had not separately capped paralegal costs. *Id.* at 16a. In light of that statutory feature, the court found it "unlikely that Congress would have set the maximum fee for paralegal services as high as $75 per hour (the equivalent, of about $185 in today's dollars)—a level that likely exceeded the then-current billing rate for paralegal services—given the overall desire to cap allowable fees below market rates." *Id.* at 16a-17a (footnote omitted) (citing *Arlington Cent. Sch. Dist. Bd. of Educ.* v. *Murphy*, 126 S. Ct. 2455, 2460 (2006)). Indeed, the court noted, the legislative history underlying the EAJA's 1985 reenactment specifically addressed the question of paralegal costs and states that paralegal charges reflect a "type of expense[]" under the

EAJA that is "billed at cost." *Id.* at 19a; see *id.* at 56a n.2.

The court of appeals recognized that *Missouri* v. *Jenkins*, 491 U.S. 274 (1989), had construed a "reasonable attorney's fee" under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. 1988, to include compensation for the work of paralegals, and that similar fee-shifting statutes using similar language are normally construed in the same manner. Pet. App. 9a-11a, 13a. However, the court concluded that the "differences in the surrounding language, structure, and purpose" of the EAJA required that the Act be interpreted differently from Section 1988. *Id.* at 13a-15a.

Senior Judge Plager dissented. Pet. App. 20a-24a. He reasoned that the interpretation of the EAJA should be guided by this Court's interpretation of Section 1988, and thus concluded that paralegal services should be recoverable as "attorney fees." *Id.* at 20a-21a.

SUMMARY OF THE ARGUMENT

The court of appeals correctly held that paralegal expenses are reimbursed at cost under the EAJA as "other expenses" and are not "attorney fees" reimbursable at prevailing market rates.

I. A. The EAJA provides that federal agencies shall award "fees and other expenses" to prevailing parties in adversary administrative adjudications when the position of the United States is not substantially justified and no special circumstances would make the award unjust. 5 U.S.C. 504(a)(1). "Fees," in turn, are categorized as attorney, agent, and expert witness fees, the reimbursement of which is limited to prevailing market rates subject to a statutory ceiling for each category of fees. 5 U.S.C. 504(b)(1)(A). The language, structure, and leg-

islative history of the EAJA demonstrate that paralegal expenses are "other expenses" reimbursable at cost, and not "attorney fees."

The most natural reading of "attorney fees" in 5 U.S.C. 504 is one that provides compensation for an attorney's time spent representing a party in litigation. In common parlance, "attorney fees" do not mean "paralegal" expenses. That resolution is bolstered by the surrounding text. The EAJA's broader category of "other expenses" naturally captures costs that are associated with an attorney's representation of a party, but are not themselves "attorney fees." Thus, while expenses for paralegal assistance are not readily embraced by the phrase "attorney fees," they fall comfortably into the EAJA's second and related category of reimbursable "other expenses."

Other provisions of the EAJA confirm that "attorney fees" do not include paralegal expenses. While the EAJA requires that attorney fees be calculated based on prevailing market rates, Congress also imposed a statutory ceiling on the amount of "attorney fees" that may be awarded. Congress set the cap based on the billing rates of attorneys and not the rates of paralegals, which were dramatically lower. And when Congress set the cap at $75 and later increased it to $125 the ceiling capped "attorney fees" at a level below that of many attorneys nationwide. Congress's decision to use attorneys' charged rates subject to caps and its failure to impose any analogous caps on paralegals' rates strongly suggests Congress thought paralegal charges would be treated as expenses (subject to the "cap" of their actual cost). Cf. *Arlington Cent. Sch. Dist. Bd. of Educ.* v. *Murphy*, 126 S. Ct. 2455, 2460 (2006).

Compensating paralegal expenses as "attorney fees" would result in EAJA awards for *paralegal* time that are disproportionately high relative to the fees that can be recovered for ordinary attorney work (because paralegal rates are generally much lower than those of attorneys) and, indeed, would permit attorneys to recover paralegal expenses that are near or equal to the awards given for the time of even *extraordinarily experienced* attorneys. To the extent that litigation against the government is informed by the availability of EAJA fees, that anomaly could "distort the normal allocation of work" by encouraging attorneys to shift work to paralegals (where they can recover the full amount of, or at least a greater proportion of, their normal hourly rates) and thus "result in a less efficient performance of legal services." Pet. App. 18a.

Missouri v. *Jenkins*, 491 U.S. 274 (1989), does not compel a different conclusion. That case involved the construction of a different fee-shifting statute (Section 1988) with materially different language. Except for a narrow category of court "costs," Section 1988 authorizes reimbursement of prevailing civil rights plaintiffs only for "attorney's fees" and, the Court held in *Jenkins*, the term "attorney's fees" must therefore include compensation for the work of those paid by attorneys to contribute to the attorneys' work product. In the EAJA, however, Congress provided for reimbursement of a second statutory category—"other expenses"—in addition to "attorney fees." That second category fundamentally changes the analysis. In *Jenkins*, the Court's task was to define the term "attorney's fees," and paralegal expenses were either encompassed in that term or unrecoverable. Here, by contrast, paralegal expenses can be recovered, and the Court's task is to decide which statu-

tory category encompasses paralegal expenses. Moreover, Section 1988 was designed to provide a "fully compensatory" fee to prevailing civil rights plaintiffs; by contrast, the EAJA's fee caps specifically preclude such a recovery.

Nor does the canon of construction that similar words should normally be construed similarly suggest that *Jenkins* should be extended to the EAJA context. That canon readily yields where, as here, it is reasonable to conclude from variations in statutory text and context that the words were intended to embrace different meanings. This Court has therefore construed "virtually identical" language in fee-shifting statutes differently when the policy considerations and legislative history underlying the statutes pointed to different outcomes.

B. The EAJA's legislative history underscores that Congress intended the term "attorney fees" and the cap on such fees to apply "only to the compensation of lawyers" themselves and not to other costs connected with their representation of parties. H.R. Rep. No. 1418, 96th Cong., 2d Sess. 15 (1980). Congress made that intent plain in the process of reenacting the EAJA in 1985. For example, the Senate Report on reenactment explained that attorneys' out-of-pocket expenses should be compensated under EAJA as other expenses and that "paralegal time" should be reimbursed in that manner "at cost." S. Rep. No. 586, 98th Cong., 2d Sess. 15 (1984). This Court has twice relied on the very same report as accurately reflecting congressional intent surrounding the reenactment of the EAJA, and it addresses conclusively the question presented here.

C. If there were any doubt as to the proper construction of "attorney fees," the canon of construction that the scope of waivers of sovereign immunity should be

narrowly construed in favor of the sovereign compels the conclusion that paralegal expenses are not a type of "attorney fees" under the EAJA. Nothing in the EAJA's text requires a contrary result, particularly because the EAJA's provision of "other expenses" aptly captures paralegal expenses necessary for the preparation of a party's case.

II. The Court should reject petitioner's alternative argument that even if paralegal time is not compensated as "attorney fees" and are "other expenses" under the EAJA, "other expenses" should be reimbursed at the market rate paid by the client, not at the cost of the attorney. To begin with, this contention is not fairly included in the question presented, was not pressed or passed upon below, and therefore is not properly before the Court. In any event, the argument fails. The EAJA specifically provides that attorney, agent, and expert witness "fees" are to be awarded at prevailing market rates, but makes no similar provision for "other expenses." To the contrary, in discussing the recovery available for such "other expenses," Congress focused on reimbursement for their "reasonable *cost*." 5 U.S.C. 504(b)(1)(A) (emphasis added).

ARGUMENT

I. THE EAJA REIMBURSES PARALEGAL CHARGES AT THE COST TO THE ATTORNEY.

A. The Plain Language And The Structure Of The EAJA Demonstrate That The Paralegal Costs Are "Other Expenses" Reimbursed At Cost, Not "Attorney Fees" Reimbursed At Prevailing Market Rates

The EAJA provides that federal agencies shall award "fees and other expenses" to prevailing parties in adver-

sary administrative adjudications when the position of the United States is not substantially justified and no special circumstances would make an award unjust. 5 U.S.C. 504(a)(1). The statute's definition of "fees and other expenses" distinguishes between two categories of expenses: (1) those that qualify as attorney, agent, or expert witness "fees" and are reimbursed at "prevailing market rates" subject to a statutory cap; and (2) other, non-"fee" expenses which are reimbursed at "cost." 5 U.S.C. 504(b)(1)(A). As the court of appeals correctly concluded, the text, structure, and legislative history all point to the conclusion that paralegal expenses fall into the latter category and thus may be reimbursed at cost, not market rates.

1. The bare language of 5 U.S.C. 504 strongly favors the conclusion that paralegal expenses are reimbursable as a non-fee "expense," rather than an "attorney fee." By authorizing awards of "fees and *other* expenses," the statute identifies two types of compensable "expenses": (1) fees and (2) other, non-fee expenses. Section 504 further permits reimbursement of three types of fees for professionals that a party may retain to litigate a case: the "reasonable expenses [including fees] of expert witnesses" and "reasonable attorney or agent fees." 5 U.S.C. 504(b)(1)(A).[4] An application for an EAJA

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[4] In the EAJA context, an "agent" is a specialized non-attorney practitioner authorized to represent clients before an administrative agency with the special permission of the tribunal. See *Lane* v. *United States Dep't of Agric.*, 294 F.3d 1001, 1003 (8th Cir. 2002); *Fanning, Phillips & Molnar* v. *West*, 160 F.3d 717, 721-722 (Fed. Cir. 1998); see also H.R. Rep. No. 1418, *supra*, at 14 ("An 'agent fee' may be awarded for the services of a non-attorney where an agency permits such agents to represent parties who come before it."). Consequently, the EAJA does not authorize the payment of "agent fees" in court proceedings, where only attorneys may normally serve as legal representatives. See 28

award must therefore include an "itemized statement from any attorney, agent, or expert witness representing or appearing on behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed." 5 U.S.C. 504(a)(2).

Petitioner contends that paralegal expenses qualify as an "attorney fee" under the EAJA, but the Act's statutory language points decisively in the opposite direction. The words "attorney fees" do not, on their own, suggest that the term embraces paralegal expenses. A paralegal is not an "attorney," and, indeed, may not practice law. And while paralegals may assist attorneys who provide legal services, Congress's use of the word "attorney" rather than a more general word such as "litigation" to modify "fees" suggests that separate charges for paralegals do not constitute "attorney fees." It is also noteworthy that Congress provided that the professionals whose fees may be reimbursed must submit an itemized list of their expenses and their fees, 5 U.S.C. 504(a)(2), but Congress made no provision for paralegals to submit itemized reports of expenses and fees. That suggests that paralegal services are an expense to be listed on attorneys' itemized statements, not a fee.

At the same time, reimbursement for paralegal work fits comfortably into the EAJA's more general category of "other expenses" that may be compensated in addition to attorney, agent, or expert fees. The term "expenses" is commonly used to refer to "an item of outlay incurred in the operation of a business enterprise" or "the charges that are incurred by an employee in connection with the performance of his duties." *Webster's*

U.S.C. 2412(d)(2)(A). Petitioner does not contend that paralegal expenses qualify as "agent fees" or "expert witness fees." Cf. Pet. App. 7a, 9a.

Third New International Dictionary of the English Language 800 (1986); see *The Random House Dictionary of the English Language* 680 (2d ed. 1987) ("charges incurred during a business arrangement"); *The American Heritage Dictionary of the English Language* 462 (1976) ("[c]harges incurred while performing one's job"). That definition fits well in the EAJA context where an "attorney, agent, or expert witness representing or appearing in behalf of [a] party," 5 U.S.C. 504(a)(2), will incur such business charges in connection with the provision of professional litigation-related services. Where a paralegal provides assistance to an attorney by performing tasks necessary to prepare a party's case, the attorney's payment of such paralegal costs are closely analogous to the "cost of any study, analysis," or "project" that the EAJA identifies as "other expenses" reimbursable when "necessary for the preparation of the party's case." See 5 U.S.C. 504(b)(1)(A).

2. Other provisions within the EAJA confirm that paralegal charges ancillary to an attorney's provision of legal services are "other expenses" and not "attorney fees." In particular, the Act's detailed provisions that "define and limit" the reasonable amount of "fees" that may be compensated with federal funds, *Pierce* v. *Underwood*, 487 U.S. 552, 572 n.3 (1988), both demonstrate that paralegal expenses are not reimbursed as "fees" and reflect Congress's intent to limit the amount of profit imbedded in the fees of attorney, agents, and experts that the government will compensate under the Act.

Two independent statutory restrictions limit the amount of a reasonable fee awarded under the EAJA. First, Congress specified that the "amount of fees * * *

shall be based upon prevailing market rates for the kind and quality of the services furnished." 5 U.S.C. 504(b)(1)(A). Second, Congress further imposed statutory caps limiting the maximum hourly rate reimbursable under the Act, reflecting the judgment that, "whatever the local or national market might be," the reasonable amount of "public reimbursement" for professional services should not exceed the cap (unless a statutory exception is satisfied). See *Underwood*, 487 U.S. at 572. EAJA fee awards in agency proceedings are thus capped, for expert witness fees, at the "highest rate of compensation for expert witnesses paid by the agency involved" and, for "attorney or agent fees," at "$125 per hour unless the agency determines by regulation that an increase in the cost of living or a special factor * * * justifies a higher fee." 5 U.S.C. 504(b)(1)(A).[5]

As the court of appeals recognized, it would be anomalous to construe paralegal expenses as a type of "attorney fee" because doing so would provide disproportionately high reimbursement for paralegals (whose hourly charges are generally much lower than the fees charged by attorneys) when the EAJA restricts the hourly rate for attorney time to below prevailing rates in many legal markets. See Pet. App. 16a-17a & n.11. Congress recognized when it originally enacted the EAJA in 1980 that the statute's "attorney fee" ceiling (then at $75 per hour) would often reimburse less than the prevailing

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[5] The EAJA imposes similar statutory ceilings with respect to fees associated with civil actions in court. Expert witness fees are limited to "the highest rate of compensation paid for expert witnesses by the United States" and "attorney fees" are subject to the same $125-per-hour cap "unless the court determines that an increase in the cost of living or a special factor * * * justifies a higher fee." 28 U.S.C. 2412(d)(2)(A).

market rate for the work of attorneys. The cap was eliminated then restored in the legislative process, see S. Rep. No. 253, 96th Cong., 1st Sess. 8 (1979), as a compromise that addressed concerns about the fiscal impact of the statute.[6] After the EAJA was repealed following a three-year experimental period from October 1981 to October 1984, see EAJA, Pub. L. No. 96-481, Tit. II, §§ 203(c), 204(c), 208, 94 Stat. 2327, 2329, 2330, Congress reenacted the EAJA in 1985 with several changes, but Congress retained the pre-existing $75 hourly cap on "attorney fees." See Act of Aug. 5, 1985, Pub. L. No. 99-80, §§ 1, 6, 99 Stat. 183, 186. The $75 cap thus remained below prevailing market rates for attorneys in much of the country. See Altman Weil, Inc., *The 2003 Survey of Law Firm Economics* 82 (2003) (comprehensive survey showing that 1985 national median hourly rate for law firm associates and partners was $82 and $128, respectively). When Congress raised the cap to its current $125 per hour ceiling in 1996, it continued that pattern. See Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, Tit. II, § 231(b)(1), 110 Stat. 863; Altman Weil, Inc., *The 1996 Survey of Law Firm Economics* II-3 (1996) (*1996 Survey*) (1996 na-

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[6] In explaining the bill the Senate passed after the bill was reported by the committee which he chaired, Senator DeConcini explained that while attorney rates in some communities might be well below the $75 ceiling, the "going rate" for attorney fees in large cities was $75 per hour "or more," and that the bill's level of reimbursement did not "make the taxpayer whole" because it represented a compromise that addressed the cost concerns of the Administration. See *Award of Attorneys' Fees Against the Federal Government: Hearings Before the Subcomm. on Courts, Civil Liberties and the Admin. of Justice of the House Comm. on the Judiciary*, 96th Cong., 2d Sess. 32 (1980) (statement of Sen. DeConcini); see also pp. 27-30, *infra* (discussing legislative history).

tional average hourly rates for associates and partners were $127 and $184, respectively).

Because paralegal rates were undoubtedly far below the EAJA's fee caps when Congress established and revised them in 1980, 1985, and 1996, it would be anomalous to read the Act as compensating paralegal expenses as "attorney fees" subject to a cap that Congress established for attorneys and agents alone. Cf. *1996 Survey* II-3 (1996 national average paralegal rate was $66 per hour); cf. also H.R. Rep. No. 1418, 96th Cong., 2d Sess. 15 (1980) ("The ceiling on attorney fees relates *only* to the compensation of lawyers and agents (e.g., accountants themselves).") (emphasis added). Doing so would mean that Congress intended to ensure that paralegals—but not attorneys—could obtain all or at least a greater portion of their rates under the EAJA.[7]

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[7] Data from comprehensive surveys of legal billing rates show that the 2007 median billing rates nationwide for law firm partners and associates were $305 and $200 per hour, respectively, and were much higher in some localities. In Washington, D.C., for instance, the data reflect median hourly rates of $455 and $295, respectively. See Altman Weil, Inc., *New Survey Provides Snapshot of Law Firm Economics Across U.S.* (Aug. 2, 2007) <http://www.altmanweil.com/index.cfm/fa/r.resource_detail/oid/87716caa-56df-4ad9-b375-9e9366ba6d60/resource/New_Survey_Provides_Snapshot_of_Law_Firm_Economics_Across_US.cfm>.

The data similarly show that billing rates for paralegal time have increased in 2007 to a national median of $160 per hour. At the median hours billed per paralegal in 2006 (1490 hours), a single paralegal would generate $238,400 in law firm revenue at this rate, far outstripping the $59,973 in median total cash compensation paid to paralegals nationwide. See Altman Weil, Inc., *Paralegal Compensation Survey Shows Solid Increases* (May 22, 2007) <http://www.altmanweil.com/index.cfm/fa/r.resource_detail/oid/3f871071-6be8-44dd-a469-532a7a4ab0fb/resources/Paralegal_Compensation_Survey_Shows_Solid_Increases.cfm>; cf. Richard L. Abel, *American Lawyers* 198 (1989)

This Court recently relied upon a similar statutory anomaly in rejecting the argument that expert fees were recoverable under the attorney's fees provision of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq.* The IDEA "contains detailed provisions that are designed to ensure that ['attorney's fees'] awards are indeed reasonable," but contains no similar provisions geared to regulating the amount of fees for experts. See *Arlington Cent. Sch. Dist. Bd. of Educ.* v. *Murphy*, 126 S. Ct. 2455, 2460 (2006) (*Arlington*) (citing 20 U.S.C. 1415(i)(3)(C)-(G)). Given Congress's attention to regulating the appropriate amount of attorney's fees, this Court concluded that the "absence of any comparable provisions relating to expert fees strongly suggests that recovery of expert fees is not authorized." *Ibid.* The same reasoning applies here. Congress's attention to establishing a cap on "attorney fees" in the EAJA based upon a maximum rate that is obviously geared to the billing rates for attorneys and the absence of an analogous cap specifically geared to paralegal rates "strongly suggests" that Congress did not intend paralegal expenses to be compensated as an "attorney fee."

The anomalous results produced under petitioner's construction of "attorney fee" are reinforced by this Court's decision in *Pierce* v. *Underwood*, *supra*. There, the Court explained that the EAJA's fee cap suggests Congress determined that the cap represented "generally quite enough public reimbursement for lawyers' fees, whatever the local or national market might be." 487 U.S. at 572. Given that assessment, the "need to preserve the intended effectiveness of the [$125] cap" led the Court to read narrowly the Act's authorization to

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(discussing data from 1984 to 1986 indicating that law firms billed paralegal time at a rate two to four times the cost of a paralegal).

exceed the cap when the "limited availability of qualified attorneys or agents for the proceedings involved" justifies a higher fee, 28 U.S.C. 2412(d)(2)(A)(ii). See *Underwood*, 487 U.S. at 572-573; cf. 5 U.S.C. 504(b)(1)(A)(ii). The Court thus held that "attorneys 'qualified for the proceedings'" did not permit an increase based on an attorney's "extraordinary level of the general lawyerly knowledge and ability useful in all litigation" and was limited to contexts where attorneys were qualified in some "specialized sense" with "distinctive knowledge or specialized skill needed for the litigation in question." *Id.* at 572. Given that an attorney with an "extraordinary level of the general lawyerly knowledge and ability" can be reimbursed at a rate no greater than the Act's fee cap, it would be particularly incongruous to interpret "attorney fees" as including paralegal expenses that may be reimbursed at a rate up to the very same cap.

Moreover, as the court of appeals explained (Pet. App. 18a), to the extent that litigation against the government is influenced by the availability of EAJA fees, allowing paralegal expenses to be recovered as "attorney fees"—without a meaningful cap like the statute sets for the fees of attorneys—would "create a perverse incentive." In particular, it could cause attorneys—whose fees are capped at $125—to shift work to paralegals—whose charges are generally lower and effectively uncapped. As the court of appeals explained, "treating paralegal fees as attorney's fees would [thus] distort the normal allocation of work and result in a less efficient performance of legal services." *Ibid.* Treating paralegal expenses as "other expenses" recoverable at cost eliminates that "perverse incentive."

3. In arguing that paralegal expenses are "attorney fees" under the EAJA, petitioner principally relies not on the statute's text, but instead on this Court's interpretation of a different statute in *Missouri* v. *Jenkins*, 491 U.S. 274 (1989). Pet. Br. 14-24. *Jenkins* involved a distinct statutory scheme reflecting materially different statutory text with a different structure, purpose, and history. Those differences illustrate Congress's intent to treat the reimbursement of paralegal expenses differently in the EAJA, and demonstrate that *Jenkins*' reasoning and result should not be extended to this case.

a. The Court in *Jenkins* interpreted the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. 1988, which authorizes courts to award prevailing parties in certain civil rights actions a "reasonable attorney's fee as part of the costs." 42 U.S.C. 1988(b). Just two years earlier, the Court had concluded that Congress "comprehensively addressed" the "kinds of expenses that a federal court may tax as costs" under Fed. R. Civ. P. 54(d) by restricting the meaning of "costs" to the six types of costs listed in 28 U.S.C. 1920. *Crawford Fitting Co.* v. *J.T. Gibbons, Inc.*, 482 U.S. 437, 440-442 (1987); see *West Va. Univ. Hosps., Inc.* v. *Casey*, 499 U.S. 83, 87 & n.3 (1991) (*Crawford Fitting*'s reasoning applies to "costs" under 42 U.S.C. 1988). *Jenkins* accordingly addressed the meaning of a "reasonable attorney's fee" in Section 1988 against a backdrop in which paralegal services were not recoverable "costs" and could be recovered under Section 1988, if at all, only as attorney's fees. The Court held that they could be recovered as such fees. See *Jenkins*, 491 U.S. at 285.

Thus, in *Jenkins*, the only statutory hook for awarding paralegal expenses was a provision for "attorney's fees," so the choice was to reimburse paralegal expenses

as "attorney's fees," or nothing. In this context, the Court concluded that the phrase "reasonable attorney's fee" could not have been meant by Congress "to compensate only work performed personally by members of the bar" and, instead, must have been intended to "refer to a reasonable fee for the work product of an attorney." *Jenkins*, 491 U.S. at 285. The Court explained that the term therefore must include "the work not only of attorneys, but also of secretaries, messengers, librarians, janitors, and others whose labor contributes to the work product for which an attorney bills her client," including "the work of paralegals." *Ibid.*

Jenkins then addressed the appropriate method of valuing the work of paralegals, guided largely by the Court's prior recognition that Section 1988 grants "the successful civil rights plaintiff a 'fully compensatory fee.'" 491 U.S. at 286 (quoting *Hensley* v. *Eckerhart*, 461 U.S. 424, 435 (1983)). That requirement to "yield the same level of compensation that would be available from the market" led the Court to conclude that paralegal expenses must be reimbursed under Section 1988 in the same manner that such expenses are billed to clients in the relevant legal market at prevailing market rates. *Id.* at 286-287. Otherwise, "if the prevailing practice in the community were to bill paralegal time separately at market rates, fees awarded to the attorney at market rates for attorney time would not be fully compensatory if the court refused to compensate hours billed by paralegals or did so only at 'cost.'" *Id.* at 287.

b. While petitioner contends (Br. 15-16) that *Jenkins*' holding that paralegal expenses are an element of a "reasonable attorney's fee" under Section 1988 "applies with full force to EAJA," the reasoning underlying *Jenkins*' holding demonstrates the opposite to be true.

First, the presence of additional statutory language in the EAJA shows that the Act's use of the term "attorney fees" is more limited than that of its textual counterpart ("attorney's fees") in Section 1988. Section 1988 authorizes awards of "attorney's fees" as part of the "costs," but because the word "costs" is a recognized term of art that consists of the items listed in 28 U.S.C. 1920, see *Casey*, 499 U.S. at 87 & n.3, "attorney's fees" is the only term in Section 1988 that might authorize compensation for expenses associated with preparing a client's case. Cf. *Arlington*, 126 S. Ct. at 2460. *Jenkins* thus concluded that "attorney's fees" under that statute must take into account the "work not only of attorneys" but also the *expense* of those "whose labor contributes to the work product for which an attorney bills her client" (including paralegals) and "*other expenses* and profit." 491 U.S. at 285 (emphasis added).

The EAJA, in contrast, expressly authorizes the reimbursement of "[attorney] fees *and other expenses*," 5 U.S.C. 504(a)(1) and (b)(1)(A) (emphasis added), thereby separating into two distinct components what Section 1988 combines in the single term of "attorney's fees." These other "expenses" include items that would not be recoverable as traditional "costs." Thus, the existence of the category of "other expenses" must inform the meaning of "attorney fees." If the term "attorney fees" in the EAJA were given the same broad interpretation as its Section 1988 counterpart, that interpretation would improperly strip meaning from (and perhaps even render superfluous) Congress's express provision for "other expenses" under the Act.

Petitioner is wrong in arguing that this Court's interpretation in *Jenkins* that paralegal expenses are "attorney's fees" means that paralegal expenses must *always*

qualify as "attorney's fees." Of course, paralegal expenses would not qualify as "attorney's fees" in a statute that separately addressed "paralegal expenses" as such. And here, paralegal expenses do not qualify as "attorney fees" because the EAJA—unlike Section 1988—provides for reimbursement of a second category of "other expenses" that is naturally read to encompass paralegal expenses. Nothing in *Jenkins* precludes that construction.

Moreover, unlike Section 1988, the text of the EAJA provides that "the amount of fees"—not other non-fee expenses—are to be determined based on "prevailing market rates," 5 U.S.C. 504(b)(1)(A); establishes a cap on the rate at which "attorney fees" may be reimbursed; provides an exception from that ceiling on "attorney fees" based on factors addressing attorneys, not paralegals; and requires those categories of professionals (attorneys, agents, and experts) whose fees are to be reimbursed to submit itemized time. See 5 U.S.C. 504(a)(2) (requiring itemized statements of fees and expenses from "any attorney, agent, or expert witness" representing or appearing on behalf the fee applicant); 5 U.S.C. 504(b)(1)(A)(ii) (authorizing exception to fee cap based on "limited availability of qualified attorneys"); see also H.R. Rep. No. 1418, *supra*, at 15 ("The ceiling on attorney fees relates *only* to the compensation of lawyers and agents (e.g., accountants themselves).") (emphasis added). It would be inconsistent with these limiting aspects of the EAJA to compensate "other expenses" for the work of paralegals using prevailing market rates rather than cost since Congress expressly reserved such treatment for the "amount of fees." See also S. Rep. No. 586, 98th Cong., 2d Sess. 15 (1984) ("paralegal time" is an expense reimbursed at "cost"

under the EAJA). Had Congress intended to treat "other expenses" in the same manner, it presumably would have enacted statutory text to that effect.

The EAJA's fee cap further reflects a basic structural difference between the Act and Section 1988. Whereas "Congress's intent [was] to provide a 'fully compensatory fee'" to prevailing plaintiffs under Section 1988, *Jenkins*, 491 U.S. at 287, the EAJA is "fundamentally" different because "it is *not* designed to reimburse fees without limit" and, thus, often does not provide a "fully compensat[ory]" award because prevailing market rates for lawyers often exceed its $125-per-hour cap on fees. See *Underwood*, 487 U.S. at 573 (emphasis added).[8] The very existence of that cap, whose *only* function is to limit "public reimbursement for lawyers' fees" below prevailing market rates, *id.* at 572, illustrates a core distinction between the EAJA and fee-shifting statutes similar to Section 1988. See *id.* at 573 (concluding that whether the contingent nature of an attorney fee agreement may justify an increase in the amount of a reasonable "attorney fee" was "quite different" under the EAJA, which is a "fundamentally" different "sort of statutory scheme" than statutes like Section 1988; distinguishing *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987) (*Delaware Valley II*)); cf. *Delaware Valley II*, 483 U.S. at 713 & n.1 (award of "reasonable attorney's fee" under

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[8] This is true even in cases, unlike the present case, where regulations permit a cost-of-living adjustment to the EAJA's $125-per-hour ceiling. Assuming plaintiffs' estimate (Br. 7) of an adjusted rate of $168-per-hour to be correct, survey data indicate that the 2007 billing rates of most attorneys far exceed that rate. See p. 16 n.7, *supra* (2007 median hourly rates nationwide for partners and associates were $305 and $200 and, in Washington, D.C., $455 and $295, respectively).

Clean Air Act "follow[s] the principles and case law" developed under Section 1988).

c. The important statutory differences between the EAJA and Section 1988 fatally undermine petitioner's argument that *Jenkins*' interpretation of Section 1988 controls here. To be sure, this Court has often construed similar text to have the same meaning in different statutes and has applied that interpretive principle to Section 1988 and "many other federal fee-shifting statutes" which, like Section 1988, award prevailing parties a reasonable attorney's fee as part of costs. See, *e.g.*, *City of Burlington* v. *Dague*, 505 U.S. 557, 562 (1992); *Independent Fed'n of Flight Attendants* v. *Zipes*, 491 U.S. 754, 758 & n.2 (1989). However, the "presumption that identical words * * * are intended to have the same meaning" is "not rigid and readily yields"—even when the same word is used in separate places within a single statute—"whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed * * * with different intent." *General Dynamics Land Sys., Inc.* v. *Cline*, 540 U.S. 581, 595 (2004) (quoting *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U.S. 427, 433 (1932)).

This Court in *Fogerty* v. *Fantasy, Inc.*, 510 U.S. 517, 522-524 (1994), thus rejected the contention that its "decisions construing similar fee-shifting language" in other statutes controlled the proper interpretation of the Copyright Act even though the Copyright Act's fee-shifting provision used "virtually identical language."[9] *Fogerty* declined to extend to the copyright context the

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[9] The Copyright Act authorizes courts to award "a reasonable attorney's fee to the prevailing party as part of the costs" in civil actions under the act. 17 U.S.C. 505.

holding in *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412 (1978), that prevailing plaintiffs under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, should normally obtain an award of attorney's fees but prevailing defendants should not. While acknowledging that "fee-shifting statutes' similar language is a 'strong indication' that they are to be interpreted alike," the *Fogerty* Court held that that "normal indication" did not apply because *Christiansburg*'s reasoning relied on factors including policy considerations and Title VII's legislative history that did not apply to the Copyright Act. 510 U.S. at 523 (quoting *Zipes*, 491 U.S. at 758 n.2).[10]

That conclusion applies with even greater force here. As discussed, the pertinent text of the EAJA is not "virtually identical" to Section 1988 and, instead, contains material differences. In particular, the EAJA provides another category of expenses—"other expenses"—that are reimbursable, which is unavailable under the statute at issue in *Jenkins*. Additionally, the broader context of the EAJA's attorney fees provisions illustrates that fee awards under the Act, unlike Section 1988 and similar statutes, are not driven by a policy of full compensation. See pp. 14-16, 23, *supra*. Petitioner's narrow focus on the use of the term "attorney fees" in both the EAJA

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[10] Petitioner incorrectly suggests (Br. 19) that *Sullivan* v. *Hudson*, 490 U.S. 877 (1989), construed the EAJA's use of the term "civil action" based on the principle that similar terms in fee-shifting statutes are to be construed alike. *Hudson* nowhere invoked or relied upon that interpretive canon. Instead, the Court reviewed the reasoning in its prior decisions that addressed whether other fee-shifting statutes allowed a court to award attorney fees for administrative proceedings that were related to the action before the court, and concluded that the "principles we found persuasive" in those prior decisions also "were controlling here." *Id.* at 888-889, 892; cf. generally *Shalala* v. *Schaefer*, 509 U.S. 292, 298-300 & n.4 (1993) (limiting scope of *Hudson*'s holding).

and Section 1988 thus fails to account for the well-established rule that a statute's use of such terms must be interpreted not only by reference to the terms' specific text but also by "the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 341 (1997).[11]

B. The Legislative History And Purpose Of The EAJA Confirms Congress's Intent To Reimburse Paralegal Time At Cost As An Out-Of-Pocket Expense

The legislative history of the EAJA confirms that paralegal expenses are not a category of "attorney fees" reimbursed at prevailing market rates but rather are a type of "other expenses" to be reimbursed only at the out-of-pocket cost to attorneys. Congress expressed its understanding in 1980 that "attorney fees" was limited to compensation for an attorney's time alone and, when Congress revisited the EAJA in 1984 to reenact the statute, it clarified not only that the EAJA reimbursed reasonable out-of-pocket expenses incurred by attorneys but also that "paralegal time" should be "billed at cost" as such an expense. To the extent the

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[11] Petitioner's reliance (Br. 23-24) on *Casey* is unavailing. *Casey* simply discussed this Court's decision in *Jenkins*; it did not alter the meaning of that decision and therefore provides no basis for disregarding the considerations discussed above as to why *Jenkins* is not controlling. See *Casey*, 490 U.S. at 99-100. More fundamentally, *Casey* indicates that this Court has *not* been willing to read the phrase "attorney's fees" broadly to sweep in non-"attorney" fees where, as here, there are textual indications that Congress intended to treat "separate elements of litigation cost" (*id.* at 88) separately when it comes to awarding litigation fees and expenses. Likewise, the Court cautioned against a reading of fee-shifting statutes (including the EAJA) that would deprive meaning from the full statutory text of those provisions. See *id.* at 89, 91.

Court determines it useful to consult the legislative history, that should end the matter. Cf. *Arlington*, 126 S. Ct. at 2466 (Breyer, J., dissenting).

1. a. The EAJA's authorization to award "attorney fees" subject to a statutory ceiling resulted from a compromise entered to facilitate the Act's passage by limiting the size of awards and, hence, the Act's impact on the federal fisc. Initial efforts to enact the EAJA were derailed in the 95th Congress because of concerns regarding the Act's "high projected costs to the United States." H.R. Rep. No. 1418, *supra*, at 6. Those concerns persisted and led to a compromise in the 96th Congress limiting the scope of recovery. In the Senate, proponents of a broader bill to reimburse attorney fees more fully initially succeeded in amending the Senate bill to eliminate the $75 per hour "attorney fee" cap, but the cap was later restored by the Judiciary Committee before that bill passed the Senate. See S. Rep. No. 253, *supra*, at 8.

The Chairman of the Senate Judiciary Committee explained that the bill's $75 attorney fee cap did not "make the taxpayer whole" and, while he would have preferred authorizing more generous awards, the bill reflected a necessary "compromise[]" made in the "process of attempting to grind out legislation." See *Award of Attorneys' Fees Against the Federal Government: Hearings Before the Subcomm. on Courts, Civil Liberties and the Admin. of Justice of the House Comm. on the Judiciary*, 96th Cong., 2d Sess. 32 (1980) (statement of Sen. DeConcini). That compromise "tried to strike some common ground" recognizing that "attorneys' fees per hour vary immensely" by locality and that the "going rate" for attorneys in large cities was $75 per hour "or more." *Ibid.*; see also *ibid.* (statement of Rep.

Kastenmeier) (bill appears to "strike a balance" and to be an "accommodation to the feelings of the Government * * * as to cost" to facilitate "passing the bill"); *id.* at 33 (statement of Rep. Railsback) (bill "represent[s] a compromise").

The 1980 House Report on the Senate bill, which was enacted as the EAJA, accordingly explained that the $75 "ceiling on attorney fees relates *only* to the compensation of lawyers or agents (e.g., accountants themselves)" and does not apply to the "costs connected with their representation of a particular interest in a proceeding." H.R. Rep. No. 1418, *supra*, at 15 (emphasis added); cf. H.R. Conf. Rep. No. 1434, 96th Cong., 2d Sess. 22 (1980) (EAJA's text is identical to bill reported by House). That understanding of "attorney fees" and the associated cap on reimbursement for *attorney* time indicates that expenses for items such as paralegal time, if reimbursable at all under the EAJA, would have been understood by Congress not as "attorney fees" but as "other expenses" similar to the reimbursable "cost of any study, analysis," or "project" "necessary for the preparation of the party's case," 5 U.S.C. 504(b)(1)(A).

In the three-year period between the Act's October 1981 effective date and its October 1984 repeal, see EAJA, Pub. L. 96-481, Tit. II, §§ 203(c), 204(c), 208, 94 Stat. 2327, 2329, 2330, a "controversy [arose] over whether the definition of 'fees and other expenses' was intended to be exclusive or whether, in addition to the costs of studies and analyses [expressly included in that definition], courts and agencies may award reasonable *out-of-pocket expenses* incurred in connection with a case." S. Rep. No. 586, *supra*, at 15 (emphasis added).[12]

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[12] Compare, *e.g.*, *Ashton* v. *Pierce*, 580 F. Supp. 440, 443 & n.4 (D.D.C. 1984) ("compensation for * * * paralegal time" is "an expense

The Senate Report addressing the EAJA's reenactment thus explained that, while the bill reenacting the Act retained the original 1980 "language" of the definition, the Report provided congressional "clarification" that the definition permits reimbursement of such out-of-pocket expenses. *Ibid.*

Significantly for present purposes, the Report stated that "[e]xamples of the type of expenses that should ordinarily be compensable include paralegal time *(billed at cost)*." S. Rep. No. 586, *supra*, at 15 (emphasis added). In doing so, the Report expressly endorsed (1) an interpretation of the EAJA reflected in 1981 Model Rules implementing the Act and (2) the result reached by the Sixth Circuit concerning out-of-pocket expenses in the Section 1988 context in *Northcross* v. *Board of Educ. of the Memphis City Schs.*, 611 F.2d 624, 639 (6th Cir. 1979), cert. denied, 447 U.S. 911 (1980), overruled in relevant part by *Missouri* v. *Jenkins*, 491 U.S. 274, 285 n.7 (1989). See S. Rep. No. 586, *supra*, at 15. Both the Model Rules and the Sixth Circuit specifically treated

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covering 'study' and 'analysis' within the meaning of [the EAJA]," which is "reimbursed at actual salary cost for time expended"), and *American Acad. of Pediatrics* v. *Heckler*, 580 F. Supp. 436, 440 (D.D.C. 1984) (paralegal expenses "may be reimbursed at actual salary cost to the law firm as an expense of litigation" under the EAJA; following *Ashton*), vacated in part, 594 F. Supp. 69 (D.D.C. 1984) (vacating different portion of EAJA award), with *Glick* v. *United States Civil Serv. Comm'n*, 567 F. Supp. 1483, 1487 n.5 (N.D. Ill. 1983) (rejecting claim for paralegal expenses because such expenses are "part of the lawyer's overhead, covered by the lawyer's fee rate" under the EAJA, which "should not be assessed against a defendant at a 'profit making' rate"), aff'd, 799 F.2d 753 (7th Cir. 1986) (Table), and *Photo Data, Inc.* v. *Sawyer*, 533 F. Supp. 348, 353 (D.D.C. 1982) (limiting reimbursement of expenses to the "reasonable cost of any study, analysis, engineering report, test, or project") (quoting 28 U.S.C. 2412(d)(2)(A)).

paralegal expenses as reimbursable at the out-of-pocket cost to an attorney, not as part of an attorney fee.

b. Petitioner contends (Br. 24-28) that the Senate Report's statement that paralegal expenses are "billed at cost" does not undermine petitioner's view that such expenses are "attorney fees" compensable at market rates. That position rests on four contentions, each of which is misplaced. First, petitioner states (Br. 25) that "expenses" under the EAJA encompass "attorney fees" and that the Report merely notes that paralegal costs are "expenses." But the statute clearly distinguishes between things like studies and fees for attorneys, agents, and experts. The Report specifically explains that "out-of-pocket expenses" may be reimbursed like "the *cost* of studies and analyses" and proceeds to identify "paralegal time" as one "such expense[]" reimbursable at "cost." S. Rep. No. 586, *supra*, at 15 (emphasis added).

Second, petitioner asserts (Br. 26) that the Report's approval of the result in *Northcross* aids petitioner's case because, in petitioner's view, *Northcross* "held that attorney fees for paralegal services should be awarded at market rates," not cost. That is incorrect. *Northcross* concluded that paralegal expenses constitute "reasonable out-of-pocket expenses incurred by the attorney," which therefore would be reimbursed under 42 U.S.C. 1988 at the attorney's cost for such assistance. See *Northcross*, 611 F.2d at 639. Indeed, in *Jenkins*, this Court itself concluded that *Northcross* "considered paralegal work 'out-of-pocket expense,' recoverable only at cost to the attorney." 491 U.S. at 285 n.7.

Third, petitioner argues (Br. 25-26) the Report's reliance on a Model Rule issued by the Chairman of the Administrative Conference of the United States is inconclu-

sive because the Rule permits expenses to be billed separately from an attorney fee under the EAJA if such expenses are ordinarily billed to clients. Cf. 46 Fed. Reg. 32,900, 32,913 (1981) (Model Rule 0.106(b)). The Rule's preamble, however, explains that the Rule is based on the understanding that an "attorney's out-of-pocket expenses ordinarily chargeable to clients" should be reimbursed separately and in addition to the "charges for the attorney's time" that would be subject to the EAJA's (then) $75-per-hour ceiling on attorney fees. *Id.* at 32,904-32,905 (citing H.R. Rep. No. 1418, *supra*, at 15). The preamble accordingly explains that "paralegal costs should be chargeable as expenses" in that manner. *Id.* at 32,905. Indeed, the preamble highlights the out-of-pocket character of paralegal expenses in stating that the Model Rule's drafters decided against listing paralegal time or other specific items as "compensable expenses" because "practices with respect to charging [clients] for paralegal time, as with respect to other expenses such as duplicating, telephone charges, and the like, vary" depending on locality and field of practice. *Ibid.*

Finally, petitioner claims (Br. 26-28) that the Senate Report "is not 'legislative history' at all" because the bill it accompanied was vetoed by the President late in the second session of the 98th Congress and the EAJA was not reenacted until the next year in the following Congress. In at least two unanimous decisions, however, this Court has cited the same report as accurately reflecting congressional intent underlying the EAJA's reenactment in contexts where, as here, the post-veto passage of the EAJA involved statutory language that was not materially different from the text discussed in the report. See, *e.g.*, *Melkonyan* v. *Sullivan*, 501 U.S.

89, 96 (1991) (citing Report as demonstrating that Congress "explicitly" adopted and ratified one side of circuit split concerning the meaning of "final judgment"); *Commissioner, INS* v. *Jean*, 496 U.S. 154, 159 & n.7 (1990) (citing Report as reflecting Congress's understanding of the EAJA's definition of "position of the United States"). See also *United States* v. *Enmons*, 410 U.S. 396, 404-405 & n.14 (1973) (concluding that earlier legislative history may be pertinent where it reflects an interpretation of "the very language subsequently enacted by Congress").

In this case, the relevant statutory text of 5 U.S.C. 504(b)(1)(A) discussed in the 1984 Report is *identical* to the statutory text reenacted by Congress in 1985. In fact, the post-veto bill was merely a "revision" of the legislation that the President vetoed in 1984 and, while portions were changed to "address concerns which the Administration raised in the President's veto message," H.R. Rep. No. 120, 99th Cong., 1st Sess. 6 (1985), the bill at issue in the 1984 Senate Report reflected the definition of "fees and other expenses" enacted as law in 1985. Compare 5 U.S.C. 504(b)(1)(A) (1988), with S. Rep. No. 586, *supra*, at 1-2 (text of bill reported by 1984 Report), and EAJA, Pub. L. No. 96-481, Tit. II, § 203(a)(1), 94 Stat. 2326 (original definition retained upon reenactment).

To the extent petitioner suggests (Br. 21-22) that Congress likely intended paralegal expenses to be a form of "attorney fees" reimbursed at prevailing market rates because Congress enacted the EAJA in 1980 against a "legal background" in which courts "generally" awarded paralegal expenses at market-rates, petitioner is incorrect. Before 1980, the few precedential decisions addressing the reimbursement of paralegal expenses

under other federal fee-shifting statutes had produced decidedly uneven results.[13] More to the point, the Senate Report's ratification of the outcome in *Northcross*—in which the court held that paralegal expenses were recoverable at cost—cuts decidedly against petitioner's position.[14]

In short, to the extent there is any doubt from the EAJA's statutory text, the Act's legislative history strongly confirms that the Act reimburses "paralegal time" as an "out-of-pocket expense[]," not an attorney fee, and compensates that expense at "cost," S. Rep. No. 586, *supra*, at 15, in the same manner that the Act reimburses "other [non-fee] expenses" such as the "cost of any study, analysis," or "project * * * neces-

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[13] Compare *Northcross*, 611 F.2d at 639, and *Lamphere* v. *Brown Univ.*, 610 F.2d 46, 48 & n.3 (1st Cir. 1979) (paralegal expense reimbursed at amount paid by attorney under Title VII when paralegals were not regularly employed by the attorney), with *Todd Shipyards Corp.* v. *Director, OWCP*, 545 F.2d 1176, 1182 (9th Cir. 1976) (interpreting 33 U.S.C. 928).

[14] Not only does petitioner misread *Northcross*, as discussed earlier, petitioner's description of the "legal background" in 1980 overreads other decisions. See, *e.g.*, *Francia* v. *White*, 594 F.2d 778, 781-782 (10th Cir. 1979) (holding that award totaling $400 for legal services was abuse of discretion where record showed expenditure of 133.75 hours of attorney and paralegal time; remanding for recalculation of award without addressing how to compensate paralegal expenses); cf. *Jones* v. *Armstrong Cork Co.*, 630 F.2d 324, 325 n.1 (5th Cir. 1980) (noting that district courts had taken various positions concerning paralegal expenses). Perhaps because of the "increasingly widespread custom of separately billing for the services of paralegals" observed in the 1980s, courts of appeals appear to have more frequently addressed the question of reimbursing paralegal charges (in non-EAJA contexts) after the EAJA's enactment. See *Jenkins*, 491 U.S. at 284 & n.7, 286 (citation omitted) (noting circuit split under 42 U.S.C. 1988 based on *Northcross* and cases decided after *Northcross*).

sary for the preparation of the party's case," 5 U.S.C. 504(b)(1)(A).

2. Petitioner suggests (Br. 34) that limiting reimbursement of paralegal expenses to cost as an "other expense" would contravene the "central purpose of EAJA" to eliminate financial disincentives to litigation against the government. But the caps that Congress enacted in the EAJA for attorney fees, among other provisions, underscore that Congress did not pursue such a purpose at all costs, and petitioner simply fails to account for the compromises that Congress struck to enact the legislation.[15] More generally, petitioner ignores the fact that "no legislation pursues its purposes at all costs" and that "[d]eciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice." *Rodriguez* v. *United States*, 480 U.S. 522, 525-526 (1987) (per curiam) ("[I]t frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law."). Indeed, this Court's decision in *Underwood*, which construed the EAJA's attorney fee provisions narrowly in order to "preserve the intended effectiveness" of the EAJA's ceiling on the reimbursement of attorney fees, illustrates that the Act's general goals cannot form a proper basis for determining the amount of reimburse-

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[15] Petitioner cites to language in *Jean*, 496 U.S. at 163, suggesting that the EAJA was intended to "eliminate" not just diminish the financial disincentive to challenge certain governmental actions. *Jean*, however, only addresses the "narrow" question of eligibility for an EAJA award "rather than the amount that may be appropriately awarded," and nothing in *Jean* suggests that EAJA awards should fully compensate litigants. See *id.* at 156, 163.

ment awarded under the EAJA. See *Underwood*, 487 U.S. at 572-573.

Petitioner contends that the EAJA should be construed to reimburse paralegal costs at market rates rather than cost because doing so would encourage paralegal use at lower rates and, thus, encourage the "cost-effective delivery of legal services." Br. 28-29 (quoting *Jenkins*, 491 U.S. at 288). There are two problems with this argument in the EAJA context. First, because the "EAJA subsidy is not directed to a category of litigation that can be identified in advance," a "lawyer will rarely be able to assess with any degree of certainty the likelihood that the Government's position will be deemed so unreasonable as to produce an EAJA award," *Underwood*, 487 U.S. at 573-574, and it therefore may be unlikely that the availability of fees will substantially influence litigation against the government. Cf. 5 U.S.C. 504(a)(1) (authorizing EAJA awards to prevailing parties only where the government's position is not "substantially justified"). Second, to the extent that such litigation *is* influenced by the availability of EAJA fees, petitioner has it wrong. As the court of appeals explained, treating paralegal fees as attorney fees could "distort the normal allocation of work and result in a less efficient performance of legal services" under the EAJA, because of the fact that the Act's cap is set generally to attorney rates (not paralegal expenses) and paralegal rates are much lower than those of attorneys. Pet. App. 18a. The inefficient delegation of attorney tasks to paralegals could, at the very least, increase the time it takes to complete such tasks, thereby increasing the overall size of EAJA awards in a manner contrary to Congress's intent to limit awards under the EAJA's fee caps.

C. Principles Of Sovereign Immunity Require That The Term "Attorney Fees" Be Narrowly Construed To Exclude Paralegal Expenses

Because the EAJA's statutory text, structure, and relevant background confirm that paralegal expenses are not "attorney fees" reimbursed at prevailing market rates, this Court need not invoke sovereign immunity principles to resolve this case. However, if the Act's text were ambiguous on this point, those principles would require that the Act's award of "attorney fees" be construed narrowly to exclude paralegal time.

It is well settled that waivers of sovereign immunity "cannot be implied but must be unequivocally expressed." *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980) (quoting *United States* v. *King*, 395 U.S. 1, 4 (1969)). Statutory text waiving that immunity must be "specific and express," *King*, 395 U.S. at 4, and not enlarged beyond what the language plainly requires. *United States* v. *Nordic Vill., Inc.*, 503 U.S. 30, 34 (1992); see *Lane* v. *Pena*, 518 U.S. 187, 191-192 (1996). A statutory waiver therefore "must be 'construed strictly in favor of the sovereign,'" *Nordic Vill.*, 503 U.S. at 34 (citation omitted), by interpreting "ambiguities in favor of immunity." *United States* v. *Williams*, 514 U.S. 527, 531 (1995). Even when Congress has waived sovereign immunity, that waiver itself must be "strictly construed, in terms of its scope, in favor of the sovereign." *Department of the Army* v. *Blue Fox, Inc.*, 525 U.S. 255, 261 (1999) (citing *Lane* v. *Pena*, *supra*, and *Library of Cong.* v. *Shaw*, 478 U.S. 310 (1986)).

Nothing in the EAJA's text clearly and unambiguously requires that "attorney fees" be construed to include paralegal expenses. The statutory text does not directly address the work of paralegals and, even in less

complex statutory fee-shifting regimes such as Section 1988, this Court has suggested that the term "attorney's fees" standing alone is "genuinely ambiguous" with respect to whether it includes paralegal costs. See *Casey*, 499 U.S. at 100; pp. 12-13, *supra*. Moreover, as noted, the Act contains provisions that are distinct from and more detailed than the average fee-shifting statute, and those unique provisions indicate that "attorney fees" in the EAJA context are limited to compensation for time worked by attorneys alone. See pp. 13-18, *supra*. Those provisions defining the amount of fees that may be awarded and the EAJA's broader authorization to award non-fee "other expenses" thus indicate that paralegal costs are best understood as "other expenses," not as "attorney fees." Even assuming that this interpretation were not compelled as a textual matter, the statute's silence regarding paralegal expenses at the very least reflects ambiguity regarding whether such costs are "attorney fees," which are reimbursed at prevailing market rates, or "other expenses" necessary for the preparation of a party's case, which are reimbursed at cost. Cf. *Barnhart* v. *Walton*, 535 U.S. 212, 218 (2002) (Where a "statutory provision says nothing explicitly about" an issue, "such silence * * * normally creates ambiguity.").

"Attorney fee" should thus be construed narrowly to exclude paralegal expenses in light of any such ambiguity. See *Ardestani* v. *INS*, 502 U.S. 129, 137-138 (1991) (applying strict construction to the EAJA's use of "adversary adjudication" and rejecting view that "broad purposes" of the EAJA can be invoked to overcome strict construction); *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 685-686 (1983) (strictly construing the term "appropriate" in fee-shifting statute waiving sovereign

immunity from fee award); see also *United States Department of Energy* v. *Ohio*, 503 U.S. 607, 626-627 (1992) (construing statutory authorization to impose monetary "sanctions" imposed as "civil penalties" against government as excluding punitive penalties notwithstanding Congress's use of "a seemingly expansive phrase like 'civil penalties arising under federal law' " and "unresolved tension" in the statutory scheme suggesting that punitive sanctions may have been intended by Congress). Application of sovereign immunity principles to limit the recovery of paralegal expenses to actual costs is particularly appropriate for two additional reasons. First, the concerns about protecting the public fisc that animate the strict construction rule are not just an abstraction in the EAJA context. Congress in enacting and amending the EAJA specifically recognized the need to limit the burden on the public fisc. It is quite unrealistic to think Congress would have *sub silentio* vastly increased the government's exposure to charges for paralegals above and beyond actual cost. Second, application of the principles here will not leave petitioner without a remedy or render paralegal expenses unrecoverable. As discussed, Congress authorized EAJA awards not only for "attorney fees" but also for "other expenses" necessary for the preparation of a party's case, and paralegal expenses qualify as such "other expenses." Accordingly, this case (unlike *Jenkins*) concerns only *the extent to* which paralegal time is reimbursed by the EAJA, not whether they are reimbursed at all.

II. THE EAJA COMPENSATES "OTHER EXPENSES" AT THE COST TO THE ATTORNEY, NOT AT MARKET RATES CHARGED TO CLIENTS.

Petitioner argues in the alternative (Br. 36-43) that, even if payments for paralegal time constitute "other expenses" rather than "attorney fees," the EAJA compensates "other expenses" at market rates paid by the client, not at the cost to the lawyer. That issue is not fairly included in the question presented on which this Court granted certiorari, was not pressed or passed upon below, and, thus, is not properly before this Court. See *Yee* v. *City of Escondido*, 503 U.S. 519, 535, 537 (1992) (questions "related" and "complementary" to question presented are not "fairly included therein"); S. Ct. R. 14.1(a); see also *Caspari* v. *Bohlen*, 510 U.S. 383, 388-389 (1994).[16] However, even assuming the issue

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[16] The question presented asked whether a prevailing party under the EAJA may "be awarded *attorney fees* for paralegal services at the market rate for such services, *as four circuits have held*, or does EAJA limit reimbursement for paralegal services to cost only, *as the Federal Circuit panel majority below held*." Pet. i (emphases added). The petition stated that the four circuit decisions referenced in its question presented included "the Eleventh Circuit's * * * [holding] that EAJA authorizes recovery of market-rate *attorney fees* for paralegal services" and decisions from three other circuits that "refer[ed] to compensation for paralegal services as *'fees'*" and thus "presumably rel[ied] on the part of EAJA that ties the proper method of calculating 'fees' to 'market rates.'" Pet. 7-9 (emphases added). Those four rulings, the petition argued, were "directly at odds with the Federal Circuit's basic holding that paralegal services are cost-based 'expenses,' *not* 'fees.'" Pet. 9. Accordingly, the petition sought certiorari based on that purported conflict and a purported conflict with this Court's decision in *Jenkins*, which held that paralegal costs were "attorney's fees" under 42 U.S.C. 1988. Pet. 13-22. Fairly read, the question presented thus asked this Court to review only whether paralegal costs were "attorney fees" reimbursed at market rates under one line of authority or, instead,

were properly presented, petitioner's argument is unavailing.

As noted, the EAJA both distinguishes between "fees" and "other expenses" and specifically provides that the "amount of *fees*" that may be reimbursed "shall be based upon prevailing market rates for the kind and quality of the services furnished." 5 U.S.C. 504(b)(1)(A) (emphasis added); see pp. 11-14, *supra*. Congress's specific choice to measure "fees" by market rates while providing no similar provision for "other expenses" strongly indicates Congress's intent to reimburse only the expense of such non-fee items, *i.e.*, only their cost. Indeed, in specifically identifying as other expenses the "reasonable *cost* of any study [or] analysis * * * necessary for the preparation of the party's case," 5 U.S.C. 504(b)(1)(A) (emphasis added), Congress manifested its intent that non-fee "other expenses" be reimbursed at "cost." Not only does the interpretive principle of *ejusdem generis* support this conclusion, the strict construction owed to waivers of sovereign immunity requires that "other expenses" be taken no further than

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were other "expenses" reimbursed by cost under the decision below, not whether such costs were other "expenses" that should be reimbursed at market rates.

In addition, petitioner never argued below that, if paralegal costs were not "attorney fees," they should nevertheless be compensated as an "expense" at market rates. See, *e.g.*, Pet. C.A. Reply Br. 5 (arguing that "paralegal time billed at cost is an *expense* of the attorney" but "paralegal time billed as fees at billing rates are *not* 'expenses' of the attorney and may be allowed as fees"); *id.* at 6 (concluding that "paralegal services should have been awarded as fees"). Petitioner's failure to make this argument below—and the related lack of any opportunity for the court of appeals to consider and pass upon the argument—is itself a persuasive reason for this Court not to address it. See *Sereboff* v. *Mid Atl. Med. Servs., Inc.*, 126 S. Ct. 1869, 1877 n.2 (2006).

the reimbursement of "cost" reflected in the statutory text.[17]

Moreover, compensating paralegal services at market rates would be inconsistent with the statutory ceiling that Congress placed on the amount of attorney and other professional "fees" that may be reimbursed under the EAJA. While Congress clearly authorized further compensation (*i.e.*, "other expenses") beyond "fees" to cover the reasonable cost of items or services necessary for such professionals to prepare a case, there is no evidence that Congress intended to reimburse parties for any additional profit collected by attorneys that may be imbedded in the market rates tied to any "other expenses" billed to their clients. Such a reading would improperly undermine the "need to preserve the intended effectiveness of the [$125] cap," *Underwood*, 487 U.S. at 573, that plays a critical role in the Act's fee reimbursement.

Nor is petitioner correct in asserting (Br. 39) that courts have adopted a "market rate" approach to compensating "other expenses."[18] While courts have re

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[17] While petitioner argues (Br. 37-38) that the court of appeals improperly distinguished between "fees" and "expenses" because fees are a type of "expense" under the EAJA, petitioner's contention seizes on semantics not substance. The Act clearly distinguishes between "fees" and "other [non-fee] expenses" and, while the court of appeals did not retain the word "other" in its discussion of that distinction, a fair reading of the court's decision in context makes plain that its use of the term "expenses" refers to "other expenses" that do not qualify as "fees." See, *e.g.*, Pet. App. 4a, 15a.

[18] While petitioner states (Br. 39) that courts "regularly" approve expenses such as "transportation and other travel costs, postage, [and] long[-]distance telephone charges," the courts of appeals have divided over whether such charges are properly reimbursable under the EAJA. Compare *Aston* v. *Secretary of HHS*, 808 F.2d 9, 12 (2d Cir. 1986)

quired that expenses be of a type that are normally billed separately to clients in order to be reimbursable under the EAJA, see, *e.g.*, *International Woodworkers of Am.* v. *Donovan*, 792 F.2d 762, 767 (9th Cir. 1986), that requirement simply ensures that the expenses are not general overhead costs that are already accounted for (in addition to profit) in the prevailing market rates for attorney fees. Cf. *Jenkins*, 491 U.S. at 287 n.8 (noting that both "costs and profit margin" are imbedded in amount of attorney's fees billed to clients). Requiring that such "other expenses" be of a type normally billed to clients not only prevents over-reimbursing expenses, it ensures that the profit margin in an attorney's hourly rate is not improperly extended beyond that contemplated by the EAJA's attorney fee caps.

Petitioner's distinction between expenses directly paid by attorneys to third-party vendors and those paid for similar products produced by a firm in-house does not withstand scrutiny. While petitioner asserts (Br. 39) that "other expenses" should be paid at "market rates—that is, at the rate that the client is willing to pay in the relevant market"—that reasoning would permit reimbursement for charges beyond those paid by attorneys to third-party vendors if the practice in the relevant legal market was to bill clients for the actual cost paid by the firm plus a firm overhead charge. Petitioner's approach would likewise permit reimbursement of items such as in-house photocopying at rates that would in-

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(travel, postage, and telephone costs are reimbursable), and *International Woodworkers of Am.* v. *Donovan*, 792 F.2d 762, 767 (9th Cir. 1986) (travel, air courier, postage, and telephone costs reimbursable), with *Precision Concrete* v. *NLRB*, 362 F.3d 847, 854 (D.C. Cir. 2004) (travel, taxis, courier and overnight delivery, facsimile and telephone costs are not reimbursable).

clude profit margin in addition to cost. Nothing in the EAJA's text or history suggests Congress intended any distinction between "other expenses" resulting from in-house or external purchases or that such expenses should be compensated at a profit-making rate for attorneys.

Petitioner's final suggestion (Br. 40-42) that calculating the cost of paralegal services poses practical problems is overstated. Attorney's fees calculations often involve litigation over amounts of fees or costs included in attorney's fee requests, including when it comes to determining the prevailing market rate. There is no reason to believe that reasonable valuations of costs attributable to paralegal expenses will prove inherently more difficult, much less elusive.[19]

Much of the difficulty that petitioner and its amici suggest may be associated with calculating paralegal costs stems from the degree of precision that they assume is required to document such costs. Such precision, however, is artificial in the attorney-fee context where reasonable approximations are generally accepted. Courts routinely estimate "reasonable" costs,

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[19] The two post-*Richlin* cases that petitioner cites do not suggest otherwise. The prevailing party in one case *requested* a $35 hourly rate based on the rate derived in this suit. That request was granted without government opposition, and nothing in the court's decision suggests that the rate was insufficient. See *Former Employees of BMC Software, Inc.* v. *United States Sec'y of Labor*, No. 04-00229, 2007 WL 4181696, at *3 & n.1 (Ct. Int'l Trade Nov. 28, 2007). The prevailing party in the second case withdrew its request for paralegal expenses rather than document the relevant paralegal costs, and the court's decision does not reflect the reason for that withdrawal. *Information Scis. Corp.* v. *United States*, 78 Fed. Cl. 673 (2007). A law firm may decline to disclose the cost it pays for its paralegals for any number of reasons independent from the inability to determine that cost.

market rates, and the time "reasonably" expended on litigation. Attorneys similarly routinely record and bill their time in estimated six- or fifteen-minute intervals. There is no reason why attorneys cannot also provide a reasonable approximation of the costs of paralegal services based on documentation of such costs.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

APPENDIX

1. 5 U.S.C. 504 provides in relevant part:

Costs and fees of parties

(a)(1) An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

(2) A party seeking an award of fees and other expenses shall, within thirty days of a final disposition in the adversary adjudication, submit to the agency an application which shows that the party is a prevailing party and is eligible to receive an award under this section, and the amount sought, including an itemized statement from any attorney, agent, or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the agency was not substantially justified. When the United States appeals the underlying merits of an adversary adjudication, no decision on an application for fees and other expenses in connection with that adversary adjudication shall be made under this section until a final and unreviewable decision is rendered by the court on the appeal or until the under-

lying merits of the case have been finally determined pursuant to the appeal.

* * * * *

(b)(1) For the purposes of this section—

(A) "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the agency to be necessary for the preparation of the party's case, and reasonable attorney or agent fees (The amount of fees awarded under this section shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the agency involved, and (ii) attorney or agent fees shall not be awarded in excess of $125 per hour unless the agency determines by regulation that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents for the proceedings involved, justifies a higher fee.);

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IN THE
Supreme Court of the United States

RICHLIN SECURITY SERVICE COMPANY,
Petitioner,

v.

MICHAEL CHERTOFF,
SECRETARY OF HOMELAND SECURITY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

The government argues that the text of the Equal Access to Justice Act (EAJA) supports the Federal Circuit's ruling, and that this Court's decision in *Missouri v. Jenkins*, 491 U.S. 274 (1989), which held that paralegal services are "attorney's fees" under 42 U.S.C. § 1988, does not apply to EAJA, even though it, too, provides for an award of "attorney fees." The government argues instead that paralegal services may be reimbursed only as "other expenses" under EAJA, and then only at the cost of such services to the lawyer, not the cost incurred by the client. And it makes the latter argument even though EAJA authorizes an award to the "prevailing party," not to the party's lawyer. None of the government's arguments is correct.

A. Paralegal Services Are Compensable At Market Rates Under EAJA.

1. The Government's Textual Arguments Fail.

The government's textual arguments fail to support its position that paralegal services are "other expenses" and not "attorney fees" under EAJA. First, the government says that Congress's decision to modify "fees" with "attorney," rather than a more general word like "litigation," shows that only the work of a lawyer is compensable as "attorney fees." *See* Gov't Br. 12. That is *exactly* the argument this Court rejected in *Missouri v. Jenkins*, which found "self-evident" the proposition that the statutory term "attorney's fees," as used in 42 U.S.C. § 1988, includes the work of paralegals "and [all] others whose labor contributes to the work product for which an attorney bills her client." 491 U.S. at 285. (And, as we have explained, *Jenkins*'s "more difficult" question—how paralegal services should be "valuated," *id.*—is answered here by EAJA's text, which requires that "attorney fees"

be awarded at "prevailing market rates." *See* Opening Br. 15, 16.)

The problem with the government's textual analysis is illustrated by a hypothetical example involving two law firms, operating when EAJA was enacted in 1980, when some law firms did not bill separately for paralegal services. The firms are identical, except that one charges its clients separately for paralegal services and the other includes them in overhead as part of its lawyers' hourly rates. Firm A bills at $35 to $50 per hour for lawyer time and $20 per hour for paralegal time, while firm B bills at $45 to $60 per hour for lawyer time (which includes the firm's cost for paralegals).[1] Firm A's clients, compared to Firm B's clients, will save money if Firm A sensibly allocates tasks to paralegals. But, under the government's theory, Firm A's clients would be *ineligible* for market-rate reimbursement for paralegal services. Firm B's clients, on the other hand, would be eligible for full EAJA reimbursement, *including for the full cost of paralegal services* because that cost is included in the lawyer's rate. It makes no sense to say as a textual matter (or otherwise), as the government effectively does, that paralegal services are "attorney fees" when they are included in the lawyer's rate, but are not "attorney fees" when billed separately. *See Jenkins*, 491 U.S. at 286-87.

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[1] *Cf. Jenkins*, 491 U.S. at 286 ("All else being equal, the hourly fee charged by an attorney whose rates include paralegal work in her hourly fee, or who bills separately for the work of paralegals at cost, will be higher than the hourly fee charged by an attorney competing in the same market who bills separately for the work of paralegals at 'market rates.'").

The government next maintains that paralegal services are best understood as "other expenses" under EAJA because such services "fit[] comfortably" within dictionary definitions of "expenses." Gov't Br. 12. The government's use of dictionary definitions of the word "expenses" is fundamentally flawed; those definitions cannot distinguish the proper treatment of paralegal work from that of attorney work because, as our opening brief explains (at 25, 36-38), EAJA's plain text denominates *all* compensable items as "expenses." Moreover, the government's argument is wrong on its own terms because the dictionary definitions it cites—*e.g.*, "the charges that are incurred by an employee in connection with the performance of his duties" or "[c]harges incurred while performing one's job," Gov't Br. 12-13—seem to describe out-of-pocket expenses paid to third-party vendors, not charges incurred by clients for a law firm's in-house professional services. And, finally, even if those definitions did properly describe professional services, they would not distinguish work performed by paralegals from work performed by law firm associates.[2]

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[2]The government (at 11) seeks support for its position by claiming that compensable items under EAJA consist solely of "(1) fees and (2) other, non-fee expenses," with the former awarded at market rates and the latter awarded at cost. In making this argument, the government claims that EAJA refers to only three types of "fees": those for experts, attorneys, and agents. Gov't Br. 11. This argument begs the fundamental question here: whether "attorney fees" include paralegal services. Moreover, the argument fails on its own terms because the statute does not set up the government's rigid fee/expense dichotomy, as the statute's treatment of the work of experts shows. The statute authorizes an award for "the reasonable *expenses* of expert witnesses," which are to be calculated at "prevailing market rates." 5

(continued...)

The government (at 24-25) also challenges our reliance on the interpretive canon that generally accords the same meaning this Court has given terms used by Congress in one statute to the same or similar terms used by Congress in another statute. *See* Opening Br. 16-20. We explained that the Court has applied this canon with particular force in the fee-shifting context. *See id.* at 18-20. The government's principal response is to cherry-pick an outlier, *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994). That case declined to apply to the Copyright Act's fee-shifting provision the general rule of *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), that, under fee-shifting statutes enacted to encourage vindication of federal civil rights, prevailing defendants are held to a more stringent fee-recovery standard than are prevailing plaintiffs. *Fogerty* did so for reasons specific to copyright policy and because the purposes of the Copyright Act's fee-shifting provision are altogether different from the "private attorney general" context in which the *Christiansburg* principle was established. *See Fogerty*, 510 U.S. at 522-27. Here, however, as our opening brief explains (at 4, 18), and the government does not contest, the purposes behind section 1988 (at issue in *Jenkins*) and EAJA—providing incentive for plaintiffs to challenge unlawful government

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[2](...continued)
U.S.C. § 504(b)(1)(A) (emphasis added); *see also* 28 U.S.C. § 2412(d)(2)(A). We note that the government attempts to place experts more firmly on the "fees" side of its false dichotomy by inserting the word "fees" in the statute where it does not actually appear. *See* Gov't Br. 11 (referring to the "'reasonable expenses [including fees] of expert witnesses'") (quoting 5 U.S.C. § 504(b)(1)(A)).

conduct and to perpetuate important legal principles—are the same.[3]

2. The Government Is Unable To Distinguish *Jenkins*.

The government (at 19-20) tries to distinguish *Jenkins*'s holding that paralegal services are "attorney's fees" under section 1988 by asserting that, because section 1988 has no express provision for an award of "expenses," if paralegal services were not awarded as market-rate "attorney fees," they could not have been awarded at all. Thus, the government suggests, *Jenkins* represents a policy-based effort to find some "statutory hook for awarding paralegal expenses." Gov't Br. 19. Putting aside the problem that out-of-pocket expenses *are* awardable under section 1988, *see* Opening Br. 38 n.13, the government's argument founders on several fronts.

First, it has no support in *Jenkins* itself, which found it a "self-evident proposition" that paralegal services are statutory "attorney's fees." 491 U.S. at 285. *Jenkins* did not even hint that the Court was striving, as a matter of "policy," to find a "statutory hook" where a legitimate textual basis for the ruling did not exist.

Second, the government's argument was rejected in *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83 (1991), which stated that the Court's decision in

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[3]Contrary to the government's suggestion (at 25 n.10), our description of *Sullivan v. Hudson*, 490 U.S. 877, 888-90 (1989), was precisely correct. *Hudson* construed EAJA's term "civil action" based in part on the Court's earlier interpretations of similar terms in two other fee-shifting statutes. *See* Opening Br. 19. Although *Hudson* did not rely on the interpretive canon expressly, it did so implicitly and with considerable force.

Jenkins was not motivated by an extratextual policy concern that if paralegal services were not held to be "attorney's fees," there would be no basis under section 1988 for recovering them at all. *Id.* at 99-100. To the contrary, *Casey* noted that, in *Jenkins*, paralegal services were held a part of statutory "attorney's fees" because, among other reasons, they "had traditionally been included in calculation of the lawyers' hourly rates." *Id.*; *see* Opening Br. 23.

Finally, as explained in our opening brief (at 24), the government's argument would only make sense if there were fee-shifting statutes, other than EAJA, that expressly shifted paralegal services, leaving the negative implication that EAJA does not. In that regard, the government ignores the fact that, in reaffirming *Jenkins*'s holding that paralegal services are statutory "attorney's fees" under section 1988, the Court in *Casey* noted that it did not know of a single fee-shifting statute that separately shifts paralegal services, and it specifically observed that EAJA does not mention such services. *Casey*, 499 U.S. at 99-100. *Casey* thus contemplated that paralegal services are attorney fees under EAJA as they are under section 1988.

3. EAJA's Adjustable Rate Cap Has No Bearing On The Issues In This Case.

Having exhausted its text-related attempts to exclude paralegal services from the ambit of "attorney fees," the government (at 9, 14-16) turns to the basis for the Federal Circuit's ruling: that EAJA must implicitly exclude paralegal services from "attorney fees" because otherwise, in light of the hourly-rate cap, a higher percentage of the

client's cost for paralegal services than for lawyer services would be recoverable.

Before addressing specifics, the government makes the general suggestion that the cap evinces an overall congressional desire to provide prevailing parties half a loaf—that is, that the mere existence of the fee cap suggests that paralegal services should be reimbursed at something less than the market rate. *See* Gov't Br. 9, 16. That reading is wrong because it would impermissibly allow one provision of EAJA, which concerns only the maximum rate at which fees may be awarded, to overwhelm the rest of the statute. After all, the cap only limits the *rate* at which fees may be reimbursed and does not purport to limit what the statutory term "fees" *encompasses*—and the latter is the issue here. And, even if one were to focus only on the rate at which fees should be awarded under EAJA, it makes no sense to consider only the *cap* and not the means by which Congress believed rates should be determined. As explained in our opening brief (at 21), if any distinction is to be drawn between EAJA, which expressly requires that fees be reimbursed at "prevailing market rates," and fee-shifting statutes such as section 1988 that require only that fees be "reasonable," the Congress that enacted EAJA would be more likely to have intended that reimbursement for paralegal services track the market.

Turning to the specifics, the government fails to address the two fatal flaws in the Federal Circuit's reasoning. First, if the fee cap is relevant to the analysis here at all, it can only be relevant if it is viewed from the vantage point of those who enacted it. *See* Opening Br. 30. Thus, for the government's argument to gain any traction, reasonable legislators contemplating EAJA's enactment

would have to have viewed the fee cap as imposing the purported distortion in fee recovery that the Federal Circuit identified. That could not have been the case. The government does not contest our long list of fee-shifting cases demonstrating that in the period leading up to EAJA's enactment in 1980, the rate cap was sufficient to meet the market rates of most lawyers in most markets. Opening Br. 30-31 & nn.9-10. Indeed, the government does not cite any cases rebutting our showing that, even in the period between EAJA's enactment and its 1985 reenactment, the cap generally proved sufficient to replicate the market. Opening Br. 31-32 & n.11 (citing cases).

The government's response (at 15 n.6) consists of a selective quotation from Senator DeConcini's 1980 testimony before a House committee to the effect that, in large cities in his state, lawyers' rates could be $75 per hour "or more." Even in isolation, this quotation is not necessarily at odds with our view that the cap was sufficient to reimburse most legal work in most markets. But the quotation is taken out of context: The government omits the beginning of the sentence, in which Senator DeConcini noted that "[w]e have communities in my State that $75 per hour would be almost twice what the going rate is." *Award of Attorneys' Fees Against the Federal Government: Hearings Before the Subcomm. on Courts, Civil Liberties and the Admin. of Justice of the House Comm. on the Judiciary*, 96th Cong., 2d Sess. 32 (1980). Moreover, the government ignores the testimony of the next witness, Assistant Attorney General Alice Daniel, who, in making the Administration's case against EAJA, emphasized that, "[i]n the first place, it is impossible to assess the number of new cases which may be generated,

in part, by the legal profession's expectation of high remuneration—up to $75 per hour." *Id.* at 42. She went on to explain that the legislation "will make sure the taxpayers *pay 100 percent* anytime the Government loses." *Id.* at 44 (emphasis added). Even if the Assistant Attorney General's testimony was somewhat exaggerated, it still underscores our point: Both EAJA's proponents and opponents believed that, with relatively few exceptions, EAJA would provide full reimbursement for the prevailing party's reasonable fees. That being the case, there is no reason to believe that the Congress that enacted EAJA would have wanted to exclude paralegal services from "attorney fees" on the ground posited by the Federal Circuit.

Second, the government does not dispute that even if EAJA is interpreted from today's perspective, in which market rates for the work of lawyers generally exceed the statutory cap, it must be acknowledged that a far higher percentage of the work of junior associates (like the work of paralegals) is compensable under EAJA than is the work of senior partners. *See* Opening Br. 34-36. This fact demonstrates that the Federal Circuit's concern regarding the effect of the fee cap has nothing to do with the proper definition of the statutory term "attorney fees," but is a consequence of hyperinflation in the legal services market since EAJA's enactment. *Cf. Jenkins*, 491 U.S. at 287 (rejecting claim that market-rate recovery for paralegal services creates a "windfall" for law firms, noting that no one "has ever suggested that the hourly rate applied to the work of an associate attorney in a law firm creates a windfall for the firm's partners. ... If the [paralegal] fees are consistent with market rates and practices, the

'windfall' argument has no more force with regard to paralegals than it does for associates.").

4. The 1984 Senate Report Does Not Aid The Government.

As explained in our opening brief (at 25-26), the Federal Circuit's reliance on a 1984 Senate committee report was misguided because (i) on its own terms, the report tends to support our position, and (ii) in any event, the report is not genuine legislative history because the legislation it purported to explain was never enacted. The government's effort to rebut those contentions fails.

The most natural reading of the report's reference to the compensability of paralegal time "billed at cost" is that if paralegal time is billed at cost in the marketplace, it should be compensated under EAJA on that basis. *See Jenkins*, 491 U.S. at 288 ("Nothing in § 1988 requires that the work of paralegals invariably be billed separately. If it is the practice in the relevant market not to do so, or to bill the work of paralegals only at cost, that is all that § 1988 requires."). As noted in our opening brief (at 25)—and uncontested in the government's brief—the Senate report does not address, let alone purport to preclude, the propriety of reimbursement at market rate when paralegal services are billed in that manner in the relevant legal market.

The government focuses on our reliance on the report's reference to the Sixth Circuit's decision in *Northcross v. Board of Education*, 611 F.2d 624 (6th Cir. 1979). It claims that *Northcross* held that paralegal fees should be awarded at the lawyer's cost. The government is wrong. Although *Northcross* referred to paralegal services as "expenses," the government otherwise ignores what *Northcross*

actually said: that the "authority granted in section 1988 to award a 'reasonable attorney's fee'" includes all expenses "which are normally charged to a fee-paying client, in the course of providing legal services." *Id.* at 639. That statement is consistent with our position—that paralegal services should be awarded as they would "normally [be] charged to a fee-paying client," that is, as reflected in the marketplace for legal services.

Moreover, the government sidesteps the most relevant portion of *Northcross*. In discussing how lower courts should arrive at "reasonable hourly rate[s]," the court explained "that it is desirable, whenever possible, to vary the hourly rate awarded depending upon the type of service being provided," because the court's "mandate [is] to award fees 'as is traditional with attorneys compensated by a fee-paying client.'" *Id.* at 638. Thus, *Northcross* concluded, "a scale of fees as is used by most law firms is appropriate to use in making fee awards pursuant to Section 1988 ..., differentiating between *paralegal services*, in-office services by experienced attorneys and trial service [to arrive at] a fair and equitable fee." *Id.* (emphasis added). In sum, the Senate report's reference to *Northcross* effectively endorses our position, and, more importantly, it certainly does not demonstrate Congress's belief that paralegal services should be reimbursed at the lawyer's cost even when clients in the relevant legal market are billed at above-cost market rates.[4]

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[4]With respect, this Court misspoke in *Jenkins* when, at the beginning of its discussion of the paralegal-services issue, it described the circuit courts' varying views and said that *Northcross* stood for the proposition that paralegal work was recoverable only at the attorney's

(continued...)

Our opening brief also noted the Senate report's reliance on an EAJA guidance issued by the Administrative Conference of the United States (ACUS), which stated that expenses should be compensable whenever the lawyer "ordinarily charges clients separately for such expenses." 46 Fed. Reg. 32,900, 32,913 (June 25, 1981) (quoted in S. Rep. No. 98-586, 98th Cong., 2d Sess. 15 (1984)). The government responds only by noting that ACUS's model EAJA rules declined to list paralegal time as invariably compensable "because 'practices with respect to charging [clients] for paralegal time ... vary' depending on locality and field of practice." Gov't Br. 31 (quoting 46 Fed. Reg. at 32,905). But that statement reflects *our* position, and the rule this Court embraced in *Jenkins*: that compensability of paralegal services should replicate prevailing practices in the relevant market. *Jenkins*, 491 U.S. at 286-87.[5]

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[4](...continued)
cost. 491 U.S. at 285 n.7. Indeed, in the 10-year period between the Sixth Circuit's decision in *Northcross* and this Court's decision in *Jenkins*, the Sixth Circuit and district courts in that circuit approved reimbursement for paralegal services at market rates. *See, e.g., Olga's Kitchen v. Papo*, 1987 WL 36385, *12 n.9 (6th Cir. 1987); *Stewart v. Rhodes*, 656 F.2d 1216, 1217, 1218 (6th Cir. 1981) (applying *Northcross*); *Echols v. Nimmo*, 586 F. Supp. 467, 477 (W.D. Mich. 1984).

[5]ACUS's 1981 decision not to set a hard-and-fast rule for paralegal services made sense because, at that time, separate market-rate billing was not ubiquitous, as it is today. *See* Br. Amici Curiae of Nat'l Ass'n of Legal Assistants (NALA Br.) at 6-7; *compare Jenkins*, 491 U.S. at 289 (noting, in 1989, that separate paralegal billing appeared to be "the practice in most communities today," and citing a NALA survey (continued...)

In any event, as shown in our opening brief (at 26-28), the 1984 Senate report is not legitimate legislative history because it accompanied EAJA legislation passed in one Congress and then vetoed by the President, while *another* Congress passed the bill that actually became law. The government responds (at 32) that the relevant text of the vetoed legislation is the same as the text of the enacted legislation. But that misses the point: Legislative history is legitimate only when it can be said to have been endorsed by the Congress that enacted the legislation it accompanies, *see* Opening Br. 27, and there is no reason for believing that a subsequent Congress has implicitly adopted the legislative history of an earlier Congress when it has not said so in legislative history of its own. *Compare United States v. Enmons*, 410 U.S. 396, 404 n.14 (1973) (relying on legislative history supporting unenacted legislation because that history was expressly referred to in the legislative history accompanying the bill that was actually enacted).

The government correctly notes (at 31-32) that the 1984 Senate report has been cited twice by this Court, but on both occasions, as in *Enmons*, the point for which it was cited was repeated in legislative history that accompanied the EAJA legislation that was enacted in 1985. *See Melkonyan v. Sullivan*, 501 U.S. 89, 96 (1991) (citing for same proposition 1984 report *and* report that accompanied 1985 enactment); *compare Comm'r, INS v. Jean*, 496 U.S. 154, 159 n.7 (1990) (citing 1984 report regarding meaning of "position of the United States" under 28 U.S.C.

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[6](...continued)
showing that 77% of law firms billed separately for paralegal services at hourly rates).

§ 2412(d)(2)(D)), *with* H.R. Rep. No. 99-120, pt. 1, at 11-13 (1985), *reprinted in* 1985 U.S.C.C.A.N. 132, 139-41 (making same point). Moreover, in *Scarborough v. Principi*, 541 U.S. 401 (2004), the government relied on the 1984 report for the proposition that EAJA's limitations period is "jurisdictional," and it noted the citations to the report in *Melkonyan* and *Jean*. *See* Gov't. Br. 29 & n.7, in *Scarborough*, No. 02-1657 (Dec. 24, 2003). But the petitioner there replied that the 1984 report should be disregarded because it accompanied vetoed legislation. Pet. Reply Br. 4-5, *Scarborough*, No. 02-1657 (Jan. 28, 2004); *see also* Oral Arg. Tr. 23-25, in *Scarborough*, No. 02-1657 (Feb. 23, 2004). A seven-justice majority held that the limitations period was not jurisdictional, *Scarborough*, 541 U.S. at 413-14, and neither the majority nor the dissent cited the 1984 report.

5. Sovereign-Immunity Principles Do Not Aid The Government.

For several reasons, the government is wrong that sovereign-immunity principles support affirmance. First, where Congress has "'waive[d] the Government's immunity from suit in sweeping language,'" *Dolan v. United States Postal Serv.*, 546 U.S. 481, 492 (2006) (citation omitted), as it has in EAJA, *see* 5 U.S.C. § 504(a) (waiving government's fee immunity and "American Rule" in all adversary administrative proceedings); 28 U.S.C. § 2412(d)(1)(A) (same as to all non-tort civil actions not otherwise subject to fee shifting), the Court's task is not to place a thumb on the scales for the government, but to interpret the text and structure of the relevant act—"no less and no more." *Dolan*, 546 U.S. at 492 (citation omitted).

Thus, in EAJA cases, the Court has repeatedly rejected the government's efforts to inject sovereign-immunity principles into the analysis. In *Jean*, 496 U.S. 154, for instance, the Court employed ordinary principles of statutory construction in interpreting the scope of EAJA's substantial justification defense, explaining that "[t]he Government's general interest in protecting the federal fisc is subordinate to the specific statutory goals of encouraging private parties to vindicate their rights and 'curbing excessive regulation and the unreasonable exercise of Government authority.'" *Id.* at 164 (citations and footnotes omitted). And, recently, in *Scarborough*, 541 U.S. at 419-21, the Court rejected the government's "most strenuous[]" reliance on sovereign immunity and held that ordinary common-law "relation back" principles apply to EAJA's limitations period. In doing so, the Court noted that "in enacting EAJA, Congress expressed its belief that 'at a minimum, the United States should be held to the same standards in litigating as private parties.'" *Id.* at 421 (quoting H.R. Rep. No. 96-1418, at 9 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4981, 4987).

The government cites *Ardestani v. United States*, 502 U.S. 129 (1991), the Court's only EAJA decision to rely on sovereign-immunity principles, but *Ardestani* supports our position. There, sovereign immunity was relevant only because the issue was whether a certain class of cases was "wholly outside the scope of the EAJA," *id.* at 137—that is, whether Congress's waiver applied at all—and the Court reiterated that ordinary principles of statutory construction apply in deciding the scope of the waiver where, as is the situation here, the case is concededly subject to EAJA. *See id.*

More fundamentally, the government's invocation of sovereign immunity is misplaced because it wrongly assumes that when Congress enacted EAJA—the relevant vantage point for statutory interpretation—market-rate reimbursement for paralegal services would have harmed the public fisc. *See* Gov't Br. 38. As explained above (at 7-9), when Congress enacted EAJA, market rates for most legal services—whether performed by lawyers or paralegals—were at or below the statutory cap. Thus, at that time, market-rate reimbursement for paralegal services would likely have protected the public fisc because, without it, in cases subject to EAJA, lawyers might have done work they would have otherwise assigned to paralegals.

The government's argument based on protecting the public fisc makes no sense for another reason. As noted earlier (at 2), at the time of EAJA's enactment, for law firms that did not separately bill for paralegal services but whose rates were at or below the cap, EAJA provided full reimbursement for paralegal work because the charges for that work were subsumed in the lawyer's fee. That type of award—which the government would concede is proper—is no less a raid on the treasury than an award involving paralegal services that are billed separately.

The government's assertion (at 38) that reversal would "vastly increase[]" the government's liability is, to put it mildly, exaggerated—and not only because the Federal Circuit's decision is at odds with the nearly uniform rule in other courts and administrative tribunals around the country that paralegal services are reimbursed at market rates under EAJA. *See* Cert. Pet. 7-13. Before EAJA's enactment in 1980, the Congressional Budget Office (CBO) predicted that EAJA would cost the taxpayers about $125

million per year by 1984. *See* H.R. Rep. No. 96-1418, at 21, *reprinted in* 1980 U.S.C.C.A.N. at 5000-01. But EAJA's costs proved to be far lower, and the CBO projected only $3 million in annual costs for fiscal year 1986. *See* H.R. Rep. No. 99-120, pt. 2, at 1 (1985), *reprinted in* 1985 U.S.C.C.A.N. 132, 152; *see also Jean*, 496 U.S. at 161 n. 9, 164 n.13. The fiscal "savings" based on the difference between the market rate for paralegal services—generally less than $90 per hour, NALA Br. 12—and law firms' costs for those services would have a negligible overall impact on the federal fisc.

Affirmance, on the other hand, would have a substantial effect on *clients*, particularly for disability claimants in social security and veterans' cases, which give rise to the majority of EAJA applications. *See Scarborough*, 541 U.S. at 408 n.2 (noting that social security cases "account for the large majority of EAJA awards") (citation omitted); U.S. Court of Appeals for Veterans Claims Annual Reports, available at www.vetapp.gov/documents/Annual_Reports .pdf (in 2006, over 1000 EAJA applications granted in veterans' cases). Federal law requires that the EAJA fee inure to the claimants' benefit in those cases, *see Scarborough*, 541 U.S. at 408 & n.2 (citing relevant statutes), and limiting recovery for paralegal services will diminish those claimants' recoveries "dollar for dollar." *Id.* at 408.

In sum, the government's argument based on sovereign immunity should be rejected.

B. If Paralegal Services Are "Other Expenses," They Are Recoverable At The Cost Incurred By The Client, Not The Attorney's Cost.

If paralegal services are "other expenses" and not "attorney fees," as the government maintains, then those expenses are recoverable under EAJA at the cost incurred by the client, not at the lawyer's cost. *See* Opening Br. 36-43. Our position is based on the statute's plain language, under which an award of expenses is made to the "prevailing party," not to the party's lawyer. 5 U.S.C. § 504(a)(1); 28 U.S.C. § 2412(d)(1)(A).[6]

Rather than respond to this textual argument, the government misstates it. It claims our position is that paralegal services, even if denominated "other expenses," are nevertheless awardable at market rates. Gov't Br. 39. That is *not* our position. Although the cost incurred by the *client* will often approximate the market rate, the two are not the same. For instance, in this case, the cost incurred by Richlin for paralegal services was $80 per hour in 2002,

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[6]Our alternative argument is fairly included in the question presented. *See* S. Ct. Rule 14.1(a). The question presented is whether EAJA authorizes an award of attorney fees for paralegal services at market rates or whether such an award must be based on "cost only." *See* Cert. Pet. i. That question necessarily includes whether "cost" means the cost incurred by the prevailing party or the cost incurred by that party's lawyer. Moreover, a narrow reading of Rule 14.1(a) should be rejected where, as here, it would allow the Court to arrive at an incorrect construction of a federal statute. *See Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 56 (2006); *see also Yee v. City of Escondido*, 503 U.S. 519, 534 (1992) ("Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.").

while, according to the Laffey matrix, the fee index used by courts in the Washington, D.C. area, the market rate was $100 per hour. *See* www.usdoj.gov/usao/dc/Divisions/Civil_Division/Laffey_Matrix_2.html.

The government never provides a reasoned explanation for why reasonable "other expenses," such as travel, telephone, and courier expenses, are invariably reimbursable under EAJA at the client's cost, *see, e.g., Kelly v. Bowen*, 862 F.2d 1333, 1335 (8th Cir. 1988), but one, and only one, "other expense"—paralegal expenses—should be reimbursed at the lawyer's cost. The government's only response is to conjure up hypothetical situations having no basis in reality. It claims that our "reasoning would permit reimbursement for charges beyond those paid by attorneys or third-party vendors if the practice in the relevant legal market was to bill clients for the actual cost paid by the firm plus a firm overhead charge," including reimbursement for in-house photocopying with a "profit margin in addition to cost." Gov.'t Br. 43.

The simple answer is that these situations generally would not involve "reasonable" expenses, *see* 5 U.S.C. § 504(b)(1)(A); 28 U.S.C. § 2412(d)(2)(A), because "the practice in the ... legal market" is *not* to add "a profit margin" to out-of-pocket expenses; indeed, as to both photocopying and disbursements to third-party vendors, absent a specific lawyer-client agreement, the profession deems a profit component unethical (that is, per se unreasonable). *See* Am. Bar Ass'n Formal Op. 93-379

(Dec. 6, 1993).[7] These scenarios are thus a far cry from paralegal services, billed at hourly rates above the law firm's cost, which are an entrenched feature of modern law practice that the profession has specifically endorsed as cost-effective for clients. *See* Am. Bar Ass'n, *Model Guidelines for the Utilization of Paralegal Services* (2004), Guideline 8 & comment thereto, available at www.abanet.org/legalservices/paralegals/downloads/modelguidelines.pdf (authorizing lawyers to charge market-rate fees for paralegal services, relying on *Jenkins*); NALA Br. 8 (similar).

The government's inability to provide any reason why Congress would have wanted to reimburse a *client's* expense at the *lawyer's* cost is illustrated by its failure to rebut our contention that calculating the lawyer's cost for paralegal services will either require a "second major litigation," *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983), or force fee applicants to forgo reimbursements to which they are entitled. *See* Opening Br. 41-42; *see also* NALA Br. 15-16 (describing difficulty of determining lawyer's cost). The government's only response is that calculating the lawyer's cost will prove no more "difficult" or "elusive" than "determining the prevailing market rate." Gov't Br. 43. Not so. A law firm's cost for an employee is based on what *that firm* pays the employee, what *that firm* pays for

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[7] *See also Jenkins*, 491 U.S. at 287 n.9 (responding to defendant's claim that if paralegal services are separately compensated "attorneys next [will] try to bill separately—and at a profit—for such items as secretarial time, paper clips, electricity, and other expenses," by noting that attorneys "would have no basis for requesting separate compensation of such expenses unless this were the prevailing practice in the local community. The safeguard against the billing at a profit of secretarial services and paper clips is the discipline of the market.").

the employee's benefits, insurance, and pension, and the allocable share of *that firm's* costs for general overhead, such as rent and utilities. *See* NALA Br. 16 (noting that "two otherwise identically situated paralegals—with the same level of experience and the same billing rate—could have markedly different costs to their employer depending on, for example, their seniority in the firm" and other factors). By contrast, documenting market rates is relatively easy because they can be ascertained by what clients are willing to pay for particular services regardless of what it costs to produce those services. Law firms make known the going rates for their services, and indices are published describing market rates in various communities.

The weakness of the government's position is underscored by its discussion of the cases decided in the wake of the decision below (which were reviewed in our opening brief at 41-42). The government claims that *Former Employees of BMC Software, Inc. v. Sec'y of Labor*, 519 F. Supp. 2d 1291 (C.I.T. 2007), does not reveal any problem in proving the lawyer's cost. But that opinion said that the decision below made calculating the award for paralegal work "particularly difficult," *id.* at 1343, and the plaintiff later accepted the same per-hour rate affirmed by the Federal Circuit in this case. *See Former Employees of BMC Software, Inc. v. Sec'y of Labor*, 2007 WL 4181696, *3 (C.I.T. 2007). The government says that "nothing in the court's decision suggests that the rate was insufficient," Gov't Br. 43 n.19, but the rate in *Former Employees* was *per se* insufficient, even under the government's theory, because it was based not on the lawyer's full cost for paralegal services, but on paralegal salaries alone. Even more weakly, the government asserts

that *Information Sciences Corp. v. United States*, 78 Fed. Cl. 673 (Fed. Cl. 2007), "does not reflect the reason" why the prevailing party "withdrew its request for fees for paralegal expenses." Gov't Br. 43 n.19. That is flatly incorrect: The $15,875 claim was withdrawn "[i]n light of the level of proof demanded by *Richlin*." 78 Fed. Cl. at 683.

And, finally, that law firms "may decline to disclose" their paralegal costs "for any number of reasons independent from the inability to determine that cost," Gov't Br. 43 n.19, hardly helps the government. To the contrary, it shows that, under the Federal Circuit's ruling, *clients* may lose some or all of their (already inadequate) award because of their *lawyers'* understandable reluctance to disclose their firms' internal costs.

* * *

For all of these reasons, the government's argument that paralegal services, alone among "other expenses," should not be awarded at the cost incurred by clients cannot be squared with EAJA's text or purpose or with common sense. We acknowledge, however, that viewing paralegal services as an out-of-pocket expense—as one would view an airline ticket—is awkward. But that is hardly our doing. It is the natural consequence of the *government's* position, which attempts to shoehorn paralegal services—which, like the work of law firm associates, are in-house professional services—into "other expenses," rather than treating them as "attorney fees," where they naturally belong. As *Jenkins* put it, because paralegal services are part of "the work product for which an attorney bills her client," it is a "self-evident proposition" that they are "attorney fees." 491 U.S. at 285.

CONCLUSION

The decision below should be reversed and the case remanded for the purpose of setting an award of attorney fees for paralegal services at market rates.

Respectfully submitted,

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IN THE

Supreme Court of the United States

Richlin Security Service Co.,
Petitioner,

v.

Michael Chertoff,
Secretary of Homeland Security,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Federal Circuit

BRIEF *AMICI CURIAE* OF NATIONAL ASSOCIATION OF LEGAL ASSISTANTS, PARALYZED VETERANS OF AMERICA, AND THE NATIONAL ORGANIZATION OF SOCIAL SECURITY CLAIMANTS' REPRESENTATIVES IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504(a)(1) and 28 U.S.C. § 2412(d)(1)(A), may a prevailing party be awarded attorney fees for paralegal services at the market rate for such services, as four circuits have held, or does EAJA limit reimbursement for paralegal services to cost only, as the Federal Circuit panel majority below held?

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INTEREST OF *AMICI CURIAE*[1]

1. The **National Association of Legal Assistants (NALA)** is a professional association offering continuing education and professional development programs for paralegals throughout the nation.[2] NALA was established in 1975 as a nonprofit organization under section 501(c)(6) of the Internal Revenue Code. It is composed of 6000 individual members and over 90 state and local affiliated associations, representing about 10,000 paralegals. Detailed information about the association is available at http://www.nala.org.

NALA has served as a leader in the development of the legal profession by supporting continuing education of paralegals and providing ethical guidelines. In 1975, NALA members adopted the first Code of Ethics and Professional Responsibility for paralegals in their day-to-day activities. In 1984, NALA members adopted its Model Standards and Guidelines for Utilization of Legal Assistants to serve as a guide for paralegals and supervising attorneys by describing the role of paralegals in the delivery of legal services. The Model is based on research of state-bar-association-adopted guidelines, ethics opinions, and case law related to paralegal utilization. NALA has

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

[2] In recent years, NALA has found that the term "paralegal" is a preferred term in certain geographic areas; in some states, "legal assistant" is falling by the wayside. This brief uses the terms "legal assistant" and "paralegal" interchangeably.

conducted a nationwide utilization and compensation survey every two to three years since 1986, and survey findings are submitted regularly to the Department of Labor.

In 1989, NALA filed an *amicus curiae* brief in *Missouri v. Jenkins*, 491 U.S. 274 (1989). In the brief, NALA explained that paralegals are a recognized and desirable addition to the modern law office. The delegation of work to a skilled paralegal reduces the cost of legal services to the client and increases attorney efficiency and productivity. Today, the contribution and value of paralegals to cost-effective delivery of legal services is indisputable and recognized even more so than it was in 1989. The paralegal occupation was then and continues to be designated as one of the fastest-growing occupations in the United States. When NALA's brief was filed in 1989, there were an estimated 53,000 paralegals (as of 1984), which was projected to rise to 104,000 by 1994. Today, the Bureau of Labor Statistics estimates that over 200,000 paralegal jobs are held in the United States. The use of paralegals continues to be promoted and encouraged when compensated at market rate as part of court-awarded attorneys' fees. In addition, the public interest is served by encouraging attorney use of paralegals where practical.

2. The **Paralyzed Veterans of America (PVA)** is a national nonprofit organization chartered by the U.S. Congress.[3] *See* 36 U.S.C. § 170101 et seq. Membership in PVA is limited to American citizens who are veterans of the U.S. Armed Forces and have a

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[3] Detailed information about PVA is available at www.pva.org.

spinal cord injury or disease. PVA has over 20,000 members, the vast majority of whom use a wheelchair for mobility. The congressionally mandated purposes of the organization include acquainting the public with the needs and problems of paraplegics; promoting medical research regarding injuries to and diseases of the spinal cord; and to advocate for and to foster various programs on behalf of members and other individuals with spinal cord injury or disease. PVA maintains an active practice at both the U.S. Court of Appeals for Veterans Claims and the U.S. Court of Appeals for the Federal Circuit litigating cases involving veterans' benefits on behalf of its members and other veterans. The recovery of legal fees and expenses under the Equal Access to Justice Act allows PVA to continue with this important effort on behalf of its members and other veterans. Therefore, the PVA has a vital interest in ensuring that the Equal Access to Justice Act is interpreted consistently with its primary purpose of ensuring that the expenses involved in litigation do not deter citizens subject to unreasonable governmental conduct, such as veterans and other with disabilities, from seeking vindication of their rights.

3. The **National Organization of Social Security Claimants' Representatives (NOSSCR)** is a non-profit membership corporation that provides professional education and related products and services to individuals who represent individuals who claim benefits under the Social Security Act.[4] NOSSCR has filed *amicus* briefs in several other cases before

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[4] Detailed information about NOSSCR is available at www.NOSSCR.org.

this Court, presenting the perspective of its membership—approximately 4000 attorneys and non-attorneys who represent Social Security claimants—and of the claimants NOSSCR represents. NOSSCR members include both lawyers and non-lawyers, in legal services organizations and in private practice, located in all parts of the country.

NOSSCR's members represent Social Security claimants before the Social Security Administration and in the courts. Overall, over five percent of all federal district court filings in the twelve-month period ending September 30, 2006 were Social Security cases,[5] and about half of those cases likely will result in some relief entitling NOSSCR's clients to seek attorney's fees under the Equal Access to Justice Act. Many of NOSSCR's members who seek EAJA fees include paralegal services in their requests. Therefore, NOSSCR has a great interest in ensuring that its members be compensated for such an integral part of their legal practice.

SUMMARY OF THE ARGUMENT

In *Missouri v. Jenkins*, this Court held that when the prevailing practice is to bill paralegal work at market rates, paralegal time should be similarly compensated for purposes of fee requests under 42 U.S.C. § 1988. Compensation at market rates, this Court reasoned, would encourage the "cost-effective delivery of legal services." This Court's holding and

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[5] *See* Table C-3, U.S. District Courts—Civil Cases Commenced, by Nature of Suit and District, During the 12-Month Period Ending Sept. 30, 2006, *available at* http://www.uscourts.gov/judbusiness2006/contents.html.

reasoning in *Jenkins* apply fully to requests for paralegal fees under EAJA: If anything, the separate billing of paralegal time at market rates is even more universally accepted now than at the time of this Court's decision in *Jenkins*, and paralegals perform substantive legal work that would otherwise be performed by attorneys, resulting in lower fees for clients and lower requests for compensation under EAJA. The Federal Circuit's assumption that allowing EAJA compensation for paralegal time at market rates would create "perverse incentives" is misplaced, as it fails to take account of both the realities of modern law practice and a court's discretion in fixing the amount of an EAJA award. The Federal Circuit's holding that paralegal fees under EAJA should instead be compensated at the attorney's cost is similarly flawed, as it too is inconsistent with the way in which law firms operate and would impose additional administrative burdens on both attorneys and courts.

ARGUMENT

I. Compensating Paralegal Time at Prevailing Market Rates Is Consistent with Practices Throughout the Country and Will Encourage the Cost-Effective Delivery of Legal Services.

1. In *Missouri v. Jenkins*, 491 U.S. 274, 285 (1989), this Court found it "self-evident" that "the 'reasonable attorney's fee' provided for by" 42 U.S.C. § 1988 "should compensate the work of paralegals, as well as that of attorneys." When it came to assigning a value to paralegals' work, this Court concluded that when "the prevailing practice is to bill paralegal work

at market rates, treating civil rights lawyers' fee requests in the same way is not only permitted by § 1988, but also makes economic sense." *Id.* at 288. Specifically, the Court explained, "[b]y encouraging the use of lower cost paralegals rather than attorneys wherever possible, permitting market-rate billing of paralegal hours 'encourages cost-effective delivery of legal services' . . . ." *Id.* (quoting *Cameo Convalescent Center, Inc. v. Senn*, 738 F.2d 836, 846 (7th Cir. 1984), *cert. denied*, 469 U.S. 1106 (1985)). Noting that the separate billing of paralegals at market rates "appear[ed] to be the practice in most communities," and in particular in the local market in Missouri, this Court upheld the lower courts' decisions ordering compensation for paralegal time at market rates. *Id.* at 289.

This Court's reasoning and holding in *Jenkins* apply fully to this case. First, like section 1988, EAJA authorizes an award of "reasonable attorney fees" to parties who prevail in litigation against the government. *See* 28 U.S.C. § 2412(d)(1)(A) ("[A] court shall award to a prevailing party other than the United States fees and other expenses . . . incurred by that party in any civil action (other than cases sounding in tort), . . . brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust."); 5 U.S.C. § 504(a)(1) ("An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the

agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust."); 28 U.S.C. § 2412(d)(2)(A) ("For the purposes of this subsection, 'fees and other expenses' includes . . . reasonable attorney fees."); 5 U.S.C. § 504(b)(1)(A) ("For the purposes of this section, 'fees and other expenses' includes . . . reasonable attorney . . . fees."). There is no reason why it should be any less "self-evident" in the context of the EAJA that "the 'reasonable attorney's fee' provided for by statute should compensate the work of paralegals."

Unlike section 1988, EAJA provides specifically that "[t]he amount of fees awarded under [the Act] shall be based upon prevailing market rates for the kind and quality of the services furnished," 28 U.S.C. § 2412(d)(2)(A); 5 U.S.C. § 504(b)(1)(A). And as federal courts have repeatedly recognized (and the government did not challenge in its brief in opposition to certiorari), the practice of billing clients separately for paralegal time at market rates has become even more entrenched throughout the country in the nearly two decades since this Court's decision in *Jenkins*.[6]

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[6] *See, e.g.*, *Edmond v. Oxlite Inc.*, No. Civ. A. 01-2594, 2005 WL 2458235, at *3 (W.D. La. Oct. 5, 2005) (finding separate billing to be the prevailing practice in the court's jurisdiction); *File v. Hastings Entertainment, Inc.*, No. Civ. A. 2-02CV0213J, 2003 WL 21976739, at *3 (N.D. Tex. Aug. 19, 2003) (same); *Cleveland Area Bd. of Realtors v. City of Euclid*, 965 F. Supp. 1017, 1020 n.4 (N.D. Ohio 1997) (same); *Spectrum Leasing Corp. v. GSA*, 93-1 B.C.A. (CCH) P25,317, 1992 GSBCA LEXIS 279, at *30-*31 (July 27, 1992) (same for Washington, D.C. metropolitan area); *see also* Nat'l Ass'n of Legal Assistants, *What Do Legal Assistants Do?*, *available at* http://www.nala.org/whatis.htm (visited Dec. 3, 2007) (explaining that "[p]rofessionally, a paralegal's time for substantive legal work (as opposed to clerical or administrative

Indeed, the American Bar Association's Standing Committee on Paralegals even instructs attorneys that a "paralegal's substantive legal work (i.e., not clerical work) may be billed directly to the client just as an attorney's work is billed, or considered in setting a flat fee just as an attorney's work would be."[7]

2. Although paralegals may have originally performed tasks that closely resembled those of a legal secretary, *see* Lisa S. Quaranta, *The Changing Role of the Paralegal*, 10 W. Va. Law. 9 (1996), they now perform, under the supervision of an attorney, substantive legal work that would otherwise be performed by an attorney – that is, precisely the kind of legal work that Congress intended to compensate under EAJA. This work may include, for example, "attending client conferences, witnessing the execution of documents, preparing transmittal letters, and maintaining estate/guardianship trust accounts,"[8] locating and interviewing witnesses, conducting investigations and statistical research, conducting legal research, drafting legal documents and

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work) is billed to clients much the same way as an attorney's time, but at a lower hourly rate").

[7] ABA Standing Cmte. on Paralegals, *Information for Lawyers: How Paralegals Can Improve Your Practice*, *available at* http://www.abanet.org/legalservices/paralegals/lawyers.html#13 (visited July 10, 2007).

[8] ABA Model Guideline 2 for the Utilitization of Paralegal Services cmt., *available at* http://www.abanet.org/legalservices/paralegals/lawyers.html#5 (visited Dec. 15, 2007) (emphasis added).

pleadings, and summarizing depositions, interrogatories, and testimony.[9]

Because paralegals are capable of handling a variety of substantive legal work that would otherwise be performed by an attorney, allowing paralegal fees to be compensated at prevailing market rates will, just as this Court noted in *Jenkins*, encourage the cost-effective delivery of legal services, thereby resulting – as the D.C. Circuit has emphasized – not only in lower fees to the client, but also in a lower request for reimbursement.[10] *See In re Donovan*, 877 F.2d 982, 992-93 (D.C. Cir. 1989) (per curiam).

Indeed, the experience of NOSSCR members also demonstrates the economic benefits that can result from the use of paralegals to perform substantive legal tasks that would otherwise be performed by an attorney. In Social Security appeals to federal court, paralegals (under the supervision of an attorney) may perform such important but time-consuming tasks as preparing a summary of the administrative record and drafting the procedural history, statement of the case,

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[9] Nat'l Ass'n of Legal Assistants, *What Do Legal Assistants Do?*, available at http://www.nala,org/whatis.htm (visited Dec. 15, 2007).

[10] *See also* ABA Standing Cmte. on Paralegals, *Information for Lawyers: How Paralegals Can Improve Your Practice, available at* http://www.abanet.org/legalservices/paralegals/lawyers.html#role; *see also* Arthur G. Greene & Therese A. Cannon, *Paralegals, Profitability, and the Future of Your Law Practice* fig. 2.1 (2003), *reprinted at* http://www.abanet.org/legalservices/paralegals/lawyers.html (providing examples of significant savings to client by delegating work such as legal research, reviewing documents, interviewing witnesses, and drafting pleadings to a legal assistant).

and summary of the medical evidence. *See also, e.g.*, *Sandoval v. Apfel*, 86 F. Supp. 2d 601, 609 (N.D. Tex. 2000) (in Social Security case, describing work performed by paralegal and emphasizing that work "might otherwise have been undertaken by [the attorney of record] at a higher hourly rate, while consuming substantially the same amount of time"). In addition to the lower client fees and, ultimately, requests for reimbursement created by the use of paralegals in Social Security cases, NOSSCR members who use paralegals also find that their use of paralegals has the further benefit of freeing up attorney time for the most important aspects of a matter, thereby allowing the attorney to provide legal assistance to more clients than she otherwise would – a particularly important consideration given the limited number of attorneys who are willing to take on Social Security cases at all.[11]

3. In concluding that paralegal fees should be compensated at cost, the Federal Circuit relied heavily on its assumption that allowing recovery of paralegal fees "at or near the full market rate" would "create a perverse incentive." Pet. App. 18a. Because attorney fees under EAJA are capped by statute, the panel majority reasoned, allowing paralegal fees to be compensated at market rates approaching that cap would "distort the normal allocation of work and result in a less efficient performance of legal services." *Id.*

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[11] A contrary holding would discourage attorneys from using paralegals. By forcing attorneys themselves to take on more of the work involved in Social Security cases, such a ruling would likely create delays in some federal court cases, as attorneys would be forced to seek extensions to permit them to complete their briefs.

Contrary to the Federal Circuit's assumption, however, allowing EAJA compensation at market rates will not create "perverse incentives." First, although EAJA imposes a cap of $125 per hour on fees for an attorney (with additional adjustment for inflation available, *see* 28 U.S.C. § 2412(d)(2)(A)(ii)), in many areas of the country there is little evidence that billing rates for paralegals are sufficiently high to create the "perverse incentives" that the panel decries. To the contrary, although courts now routinely approve EAJA fees for attorneys (when adjusted for inflation) at rates approaching $170 per hour,[12] *see, e.g.*, *Begolke v. Astrue*, No. 06-C-0445-C, 2007 U.S. Dist. LEXIS 79689 (W.D. Wis. Oct. 26, 2007) (EAJA award for attorney's fees at $165.00 per hour for attorney services); *Lambert v. Nicholson*, No. 04-815(E), 2006 WL 2619658 (Vet. App. Sept. 7, 2006) (EAJA award included attorney's fees reimbursed at rates of $153.38 and $154.31 per hour); *see also* Br. of Pet'r 7 ("The current inflation adjusted cap is approximately $168 per hour."), both the EAJA caselaw and a recent NALA

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[12] Indeed, in opposing proposed legislation that would have lifted the statutory cap on EAJA attorney's fees, the government expressly emphasized that, in its experience, "courts routinely take advantage of EAJA's current discretionary authority to exceed the hourly rate cap." Statement of Ryan W. Bounds, Chief of Staff, Office of Legal Pol'y, Dep't of Justice, Before the Subcommittee on Courts, the Internet, and Intellectual Property, Committee on the Judiciary, U.S. House of Reps., Concerning H.R. 435, the Equal Access to Justice Reform Act, at 7 (May 23, 2006) (citing, *inter alia*, *Former Employees of Tyco Elecs. Fiber Optics Div. v. U.S. Dep't of Labor*, 350 F. Supp. 2d 1075, 1093 (C.I.T. 2004), in which court awarded attorney's fees at $158.70 for work performed in 2004), *available at* www.judiciary.house.gov/media/pdfs/bounds052306.pdf (visited Sept. 20, 2007).

survey indicate that the rates for paralegals are generally – and often well – below $100 per hour. *See, e.g.*, *McKay v. Barnhart*, 327 F. Supp. 2d 263, 270 (S.D.N.Y. 2004) (indicating in Social Security case that "the prevailing rate for paralegal services in the Southern District of New York is $75 per hour"); Nat'l Ass'n of Legal Assistants, 2004 National Utilization and Compensation Survey Report tbl. 3.5, *available at* www.nala.org/Survey_Table.htm (visited June 21, 2007) (in 2004 nationwide survey of legal assistants, only thirty-eight percent reported a current billing rate greater than $90 per hour, and average billing rate for paralegals with five or fewer years of experience was $79 per hour).

Second, contrary to the assumption of the court of appeals, there is no reason to believe that the increased use of legal assistants will always result in the "less efficient performance of legal services." In response to a "demand for expertise," legal assistants have increasingly "develop[ed] knowledge and skills in highly technical or specialized subject areas." Nat'l Federation of Paralegal Ass'ns, *Paralegal Roles and Responsibilities*, *available at* http://www.paralegals.org/displaycommon.cfm?an=1&subarticlenbr=699 (visited June 21, 2007). When reviewing requests for EAJA reimbursement for legal assistants who specialize in a particular area of the law, district courts have expressly acknowledged that an attorney "is not necessarily able to" accomplish the tasks performed by legal assistants "in less time than it takes an experienced paralegal to do so." *Sandoval v. Apfel*, 86 F. Supp. 2d 601, 609 & n.12 (N.D. Tex. 2000) (approving EAJA award that included market rate for

legal assistant with "extensive experience performing paralegal work in social security disability litigation").

Third, to the extent that in some cases legal assistants may require more hours than an attorney to accomplish a particular task, the disparity between the hourly rates for an attorney and those of a legal assistant means that the use of legal assistants will remain cost-effective, as courts considering EAJA requests have repeatedly recognized. *See Nickola v. Barnhart*, No. 03-C-622-C, 2004 WL 2713075, at *1 (W.D. Wis. Nov. 24, 2004) (granting EAJA award for 33.15 hours of attorney time at $148.75 per hour and 44.2 hours of paralegal/law clerk time at $95 per hour and noting that "[a]lthough it might have taken more time for a law clerk to draft a brief than had an attorney drafted it, overall the use of law clerks in this case appears to have been a money-saving measure because it reduced the amount of time the attorney spent on the case").

Fourth, the suggestion of the decision below that, if paralegal fees are compensable at market rates, attorneys will somehow willy-nilly delegate virtually all aspects of a case to their paralegals in the hope of maximizing their compensation under EAJA is simply misplaced in at least two respects. First and foremost, although paralegals may – under the supervision of an attorney – perform a variety of substantive legal tasks that would otherwise be performed by an attorney, the attorney ultimately remains responsible for the work performed and thus has no incentive to delegate beyond the paralegal's capabilities and the point at which delegation is efficient. Thus, even if paralegals are compensated at market rates, many of the most

sensitive projects in a matter will be handled by attorneys, who after careful consideration may conclude that supervising the performance of certain tasks by a paralegal is ultimately less cost-effective for the client than performing the task themselves. Second, to the extent that attorneys may be prompted to delegate work to a paralegal, that delegation is more likely to be attributable to other factors – such as a client's desire to minimize her legal bills – than to the prospect of compensation under EAJA, which is rarely certain because the party seeking fees must first prevail and then be prepared to demonstrate that the government's litigating position was not substantially justified. Third, although paralegal fees under EAJA have long been compensated at prevailing market rates in some circuits, *cf. Burt v. Heckler*, 593 F. Supp. 1125, 1133 (D.N.J. 1984) (compensating for law clerk time at market rate of $25 per hour), the Federal Circuit did not point to any evidence that the "perverse incentives" and inefficiencies prophesized by the decision below have come to pass.

Finally, the decision below completely overlooks that courts may adjust fee awards under EAJA to avoid any "perverse incentive" problem. In *Commissioner v. Jean*, 496 U.S. 154 (1990), this Court emphasized that "a district court will always retain substantial discretion in fixing the amount of an EAJA award." *Id.* at 163. In practice, courts have availed themselves of that discretion to reduce fee awards to account for inefficiencies on the part of both attorneys and paralegals. *See, e.g.*, *Dudelson v. Barnhart*, No. 03 Civ. 7734 (RCC) (FM), 2007 U.S. Dist. LEXIS 19124 (S.D.N.Y. Mar. 20, 2007) (approving an EAJA award that included legal assistant fees at a rate of $75 per

hour but reducing the number of hours covered by the award after finding that "much of the time billed may not have been entirely productive"); *Teixeira v. Nicholson*, 2006 U.S. App. Vet. Claims LEXIS 295 (Vet. App. Apr. 4, 2006) (reducing EAJA award in light of finding that "representation by multiple counsel resulted in duplicative work and excessive billing for time spent by counsel conferring with each other").

II. Paralegal Fees Should Be Reimbursed Under EAJA at Market Rates, Rather Than at Cost.

The Federal Circuit's holding that paralegal time should be compensated at the cost to the attorney is further flawed because it is likely to impose an additional administrative burden on both attorneys and courts – a burden that can be avoided by holding that paralegal time should instead be billed at market rates.

As described in detail above, *see supra* at 7-8, attorneys overwhelmingly bill out their paralegals' time at prevailing market rates. Under this practice, attorneys have no need to calculate the per-hour cost for each of their paralegals, the majority of whom are salaried employees. *See* Nat'l Ass'n of Legal Assistants (NALA), *2004 National Utilization and Compensation Survey Report*, tbl. 2.5. Nor would it be simple for attorneys to make such a calculation for purposes of an EAJA application, as a paralegal's actual cost to his employer would necessarily include not only his salary, but also additional employer costs such as payroll taxes, workers' compensation insurance, employee benefits such as a pension plan or

health insurance, and overhead costs such as rent, utilities, and administrative support. Moreover, given the many variables that contribute to a paralegal's actual cost, employers would have to conduct an individual cost calculation for each paralegal for whom EAJA compensation is sought, as two otherwise identically situated paralegals – with the same level of experience and the same billing rate – could have markedly different costs to their employer depending on, for example, their seniority in the firm, the number of dependents covered by the firm-provided health insurance, and whether the paralegal is vested in the firm's pension plan. Indeed, the additional expenses associated with calculating the indirect costs of paralegal services in EAJA cases would likely discourage the use of paralegals by NOSSCR members, many of whom practice in small firms with limited accounting resources.

And even if attorneys did calculate the hourly "cost" for paralegal services, allowing compensation at cost would also require courts reviewing EAJA applications to conduct a fact-intensive inquiry to determine the reasonableness of those costs. Such an inquiry would necessarily be far more extensive than the brief Internet search conducted by the Board of Contract Appeals in this case and might include, for example, resolving as-yet-unexplored questions such as how to determine the cost of a paralegal's overtime when the paralegal worked on both EAJA and non-EAJA cases in a single day. By contrast, allowing compensation for paralegals at market rates eliminates much of the burden for both litigants and courts: Litigants can simply submit fee applications that include their market billing rates for paralegals,

while courts may rely on either established fee tables[13] or other cases to ensure that the rates are reasonable. *See, e.g.*, *McKay v. Barnhart*, 327 F. Supp. 2d 263, 270-71 (S.D.N.Y. 2004) (citing other recent cases for evidence of the prevailing market rate for paralegal services).

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Compensating paralegal time under EAJA at cost would be, as noted above, inconsistent with the realities of modern law practice. Moreover, because such a practice would likely discourage use of paralegals in many small firms, including those of many NOSSCR members, a holding that required paralegal time to be compensated only at cost would directly conflict with one of the goals of the federal fee-shifting statutes – viz., to encourage lawyers to take on cases. By contrast, allowing paralegal fees to be compensated at market rates is consistent with the near-universal practice of attorneys nationwide, encourages the cost-effective delivery of legal services, and frequently will enable attorneys such as members of NOSSCR to take on more cases in which EAJA compensation may be available. Moreover, it will significantly reduce the likelihood of ancillary litigation over the reasonableness of EAJA fee requests, thereby reducing litigation burdens on successful plaintiffs, the federal government, and the courts.

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[13] For example, the U.S. Attorney's Office for the District of Columbia publishes the "Laffey Matrix," a list of market rates that may be cited for fee awards in fee-shifting cases. *See* "Laffey Matrix 2003-2008," http://www.usdoj.gov/usao/dc/Divisions/Civil_Division/Laffey_Matrix_7.html (last visited Dec. 17, 2007).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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